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REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF OREGON

ROBERT G. MORROW
REPORTER

VOLUME 37

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OFFICERS OF THE SUPREME COURT

DURING THE TIME OF THESE DECISIONS.

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*JUDGE WOLVERTON was Chief Justice until July 1, 1900, when he became Associate Justice, having been re-elected.

†JUDGE BEAN has been Chief Justice since July 1, 1900.

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CASES DECIDED
IN THE
SUPREME COURT
OF
OREGON.

Argued 17 January; decided 5 March; rehearing denied 23 April, 1900.

MULTNOMAH COUNTY v. KELLY.

[60 Pac. 202.]

LIMITATIONS—ACTION ON STATUTORY BOND OF SHERIFF.

1. An action on a sheriff's undertaking for the faithful performance of his duties as tax collector is based on a liability created by statute, and it is governed, in respect to the time of its commencement, by Hill's Ann. Laws, § 6, subd. 2, providing that an action on a liability created by statute shall be commenced within six years, and not by section 7, subd. 1, providing that "an action against a sheriff on a liability incurred by the doing of an act in his official capacity and in virtue of his office shall be commenced within three years," which refers only to actions on liabilities incurred while discharging his ordinary functions.

STATUTORY CONSTRUCTION—PLEADING—LEAVE TO SUE.

2. The objection to a complaint in an action on the bond of a public official, that leave to sue has not been granted, should be taken by motion for nonsuit as required by Section 342, Hill's Ann. Laws, otherwise it will not be considered when raised for the first time on appeal.

Headnotes by WOLVERTON, C. J.

From Multnomah: ALFRED F. SEARS, Jr., Judge.

Action by Multnomah County against Penumbra Kelly and others. Defendants appeal. AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. John W. Whalley*.

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37	1
146	275

For respondent there was a brief over the names of *Russell E. Sewall*, District Attorney, and *Roscoe R. Giltner*, with an oral argument by *Mr. Sewall*.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

This is an action instituted October 15, 1897, by the plaintiff county against its former sheriff and the sureties upon his undertaking for the faithful performance of his duties as tax collector, and for the payment to the county treasurer of all moneys collected by him in such capacity. The funds for which recovery is sought were collected between March 28, 1893, and August 1 of the same year. The case comes here on demurrer to the complaint, based upon the single ground "that the action has not been commenced within the time limited by the Code of Civil Procedure, as appears upon the face of said complaint, to wit, within three years from the time the alleged cause of action arose." The court below held that the demurrer was not well taken, and, judgment being rendered for plaintiff, the defendants appeal.

1. The defendants invoke Section 7, Hill's Ann. Laws, in bar of the action, which section prescribes (subd. 1) that "an action against a sheriff, coroner, or constable, upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office; or by the omission of an official duty; including the nonpayment of money collected upon an execution,"—shall be commenced within three years. But its application is not apparent. The duties of the sheriff as tax collector are quite distinct from those imposed upon him while acting in his ordinary capacity. For the faithful discharge of such duties, he is required by the statute to give a separate and distinct undertaking. Indeed, his undertaking as sheriff will not cover defalcations as tax collector:

Columbia County v. Massie, 31 Or. 292 (48 Pac. 694). It was said in that case that "the duties of sheriff, as such, are more or less directly connected with the administration of justice, and have no relation whatever to the collection of the public revenues. They relate to the execution of the orders, judgments, and processes of the courts, the arrest and detention of persons charged with crime, the preservation of the public peace, the service of papers, and the like; and therefore when the legislature required the giving and filing of an undertaking before entering upon the performance of the duties of sheriff, and another before entering upon the performance of the special duty of collecting the public taxes, it is but reasonable to assume that it had this distinction in mind, and intended the official bond to cover the duties of the sheriff as such, and the other and additional bond as security for the performance of the special duty imposed upon him by the law requiring him to collect the public revenues, and that the sureties on one bond should not be liable for any defalcation in the performance of the duties for which the other was given." The duties imposed upon the sheriff, while acting in the capacity of tax collector, are special in character, and are not such as pertain to the ordinary functions of that officer. Section 7, subd. 1, has reference to actions against the sheriff upon liabilities incurred by him while acting in the discharge of his ordinary functions, and we are of the opinion that it was not designed to cover the defalcation of the sheriff while acting in his official capacity as tax collector, any more than the undertaking as sheriff was designed to cover his acts while in the discharge of his special functions. Such being the case, *Howe v. Taylor*, 6 Or. 284, becomes decisive of the controversy, and the action may be denominated one arising upon a liability created by statute, and governed, in

respect of the limitation of its commencement, by Section 6, subd. 2, Hill's Ann. Laws. Six years is therefore the time prescribed for its commencement. Within the rule of that case, the undertaking must be considered as a security against the official delinquencies, and the officer, by his neglect of duty in failing to account for the funds collected, rendered both himself and sureties liable thereon.

2. It is insisted here, however, for the first time, that the complaint does not state facts sufficient upon which to base the action, in this: that it does not show that leave had been first obtained of the court in which the action was brought, or of the judge thereof, before commencing the same, as required by Section 342, Hill's Ann. Laws. That section reads: "Before an action can be commenced by a plaintiff other than the state, or the municipal or public corporation named in the undertaking or other security, leave shall be obtained of the court or judge thereof where the action is triable. Such leave shall be granted upon the production of a certified copy of the undertaking or other security, and an affidavit of the plaintiff or some person on his behalf showing the delinquency. But if the matters set forth in the affidavit be such that, if true, the party applying would clearly not be entitled to recover in the action, the leave shall not be granted. If it does not appear from the complaint that the leave herein provided for has been granted, the defendant on motion shall be entitled to judgment of nonsuit; if it does, the defendant may controvert the allegation, and if the issue be found in his favor, judgment shall be given accordingly." But as the question was not raised in the court below, and the section just quoted having designated a specific mode of raising it, which is by motion for nonsuit, if it does not appear from the complaint that leave had been granted, and that mode not

having been adopted, we do not now feel warranted in disturbing the action of the lower court: 15 Enc. Pl. & Prac. 95. The judgment will therefore be affirmed.

AFFIRMED.

Argued 29 January; decided 12 March; rehearing denied 9 April, 1900.

GOODNOUGH v. GATCH.

[60 Pac. 383.]

SUBROGATION—RECEIVERS—EQUITY.

1. A creditor who seeks to reach property in the hands of a receiver and have it applied to the payment of his claim should proceed in the receivership suit by petition, and not by an original suit in equity.

LEAVE TO SUE—ESTOPPEL.

2. An order of court, obtained *ex parte*, and without notice to interested parties, authorizing a suit against a receiver, does not preclude the court from dismissing such suit on the ground that plaintiff has mistaken his remedy.

From Marion: GEO. H. BURNETT, Judge.

This is a suit by A. Goodnough against Claud Gatch and R. J. Fleming to require a receiver to deliver to the plaintiff any balance of the receivership property remaining in his hands after deducting the costs and disbursements of the suit wherein he was appointed. The complaint, after alleging permission of the court to bring the suit, avers that under and by virtue of a decree of the Circuit Court of Marion County, in a suit wherein Samuel Heitshu, C. H. Woodard, and L. G. Clarke were plaintiffs, and W. E. Hawkins and others defendants, the defendant Gatch was appointed receiver, and as such is in the possession of certain money, notes and accounts formerly belonging to the estate of Hawkins, for the purpose of collecting the same, and applying the proceeds towards the liquidation of a judgment of Heitshu and others against Hawkins; that among the property so in his possession is a note of Eugene and Percy Willis

to Leo Willis for \$650, which was indorsed by the latter to R. J. Fleming, and by Fleming to the defendant Gatch, without recourse; that such note is of the probable value of \$650, is not yet due, and is in the actual possession of Fleming, who it is desired should be restrained from disposing of the same otherwise than according to the prayer of the complaint; that on June 30, 1893, Woodard and Clarke, for a valuable consideration to them paid, sold, assigned and transferred all their interest in the judgment against Hawkins to Heitshu, who ever since has been and is now entitled to any balance of the property in the hands of the receiver which may be left after the payment of the costs of the suit and of the receivership; that on the second day of July, 1897, the plaintiff recovered a judgment in the Circuit Court of Multnomah County against Heitshu and one F. K. Arnold for the sum of \$1,062.95 and interest, and caused an execution to be issued thereon and placed in the hands of the Sheriff of Marion County for service, but that such sheriff has been unable to find any property belonging to Heitshu out of which to satisfy the judgment, and without knowledge of the receivership attempted to levy upon the note in the possession of Fleming; that Heitshu and Arnold are insolvent, and have no other property out of which plaintiff can collect his judgment; that the defendant Gatch threatens to, and will, unless restrained and enjoined, proceed to collect the notes and accounts, and pay over the proceeds thereof to Heitshu, to the great and irreparable injury and damage of the plaintiff; that George G. Bingham, who now assumes to act as attorney for the receiver, was at all the times mentioned, and is now, the attorney of record for Heitshu, and, although purporting to act as attorney for the receiver, is seeking to have the Willis note turned over to the receiver by Fleming in order

that he may come into the possession thereof as the pretended attorney for the receiver, and seeks to acquire a lien thereon for services as attorney for Heitshu in the suit wherein the receiver was appointed, with intent to thereby cheat, hinder, delay and defraud plaintiff out of his just claims against Heitshu, his judgment debtor; that plaintiff has no plain, speedy or adequate remedy at law, wherefore he prays for a decree that Gatch and Fleming be restrained and enjoined from paying over or delivering the note or the proceeds thereof to Heitshu, or any person claiming by, through or under him, and that Fleming be restrained from delivering the note to the receiver so long as Bingham or any other attorney to whom Heitshu is indebted continues to act as the attorney for the receiver, and that upon the final hearing a decree be entered directing Gatch to deliver any balance remaining in his hands as such receiver to the plaintiff, after deducting the costs and disbursements of the suit wherein he was appointed, to be applied towards the satisfaction of plaintiff's judgment against Heitshu. To this complaint the defendants demurred on the ground that there is a defect of parties defendant, in that Heitshu and Bingham are necessary parties to a complete determination of the controversy, and that it does not state facts sufficient to constitute a cause of suit. This demurrer was sustained, and, the plaintiff refusing to amend or plead further, a decree was entered dismissing the complaint, from which he appeals. AFFIRMED.

For appellant there was a brief and an oral argument by *Messrs. M. E. Pogue, Ralph W. Wilbur, and Wm. M. Kaiser.*

For respondent there was a brief and an oral argument by *Mr. Geo. G. Bingham.*

MR. JUSTICE BEAN, after stating the facts, delivered the opinion of the court.

1. We need not consider whether Mr. Heitshu and Mr. Bingham are necessary parties, because we are of the opinion that the plaintiff's remedy, if any, was by a petition to the court in the cause in which the receiver was appointed, and not by an independent suit. The property which he seeks to subject to the payment of his claim is admitted to be in the rightful possession of the receivers. It is, therefore, *in custodia legis*, and the receiver's possession, which is, in effect, the possession of the court, cannot be interfered with, either by strangers to the suit, parties thereto or persons claiming under them, or by other courts of co-ordinate jurisdiction. It cannot be seized under execution or attached, nor will the receiver be restrained in the discharge of his duties by the injunction: Smith, Rec. § 7; *Van Rensselaer v. Emery*, 9 How. Prac. 135. The plaintiff is claiming the fund in the hands of the receiver through one of the parties to the suit in which such receiver was appointed, and his right ought to be worked out in that suit. He seeks, in effect, to be subrogated to the rights of Heitshu in the original suit against Hawkins, and an order that the fund in the hands of the receiver be paid to him to apply on his judgment against Heitshu, and not to Heitshu direct; and this question, affecting as it does, the disposition and distribution of the funds *in custodia legis*, can be passed upon only by the court having the control thereof, and in which the rights of all claimants to the fund can be protected. In such case, manifestly, the proper practice is for a person claiming an equitable interest or title to the fund to file a petition in the original suit, setting up his rights, and have them determined therein: Gluck & B. Rec. 373; Smith, Rec. § 415; *Columbian Book Co. v. De Golyer*, 115 Mass. 67; *Porter v. Kingman*, 126 Mass. 141.

The question here is one involving the distribution of property in the hands of a receiver holding it subject to the orders and directions of the court, and not the right of a party to intervene in a suit between other parties.

2. Nor is the order of the court authorizing this suit conclusive. It was made *ex parte*, and without notice to interested parties, and does not preclude the court from dismissing the complaint, after a hearing, on the ground that the plaintiff has mistaken his remedy. The decree of the court below is therefore affirmed. **AFFIRMED.**

Argued 30 January; decided 12 March, 1900.

HALLOCK v. SUITOR.

[90 Pac. 384.]

FLOATABLE STREAMS ARE NAVIGABLE.

1. A stream capable of floating logs and timbers to market is a navigable stream, and is not deprived of its navigable character by the fact that for a portion of the year it cannot be used for that purpose: *Nutter v. Gallagher*, 19 Or. 375, applied.

WATERS—ESTOPPEL TO REVOKE PAROL LICENSE.*

2. The fact that a riparian owner upon a navigable stream made no objection when a lower riparian owner announced his intention to build a dam on her land, is not equivalent to a license to construct the dam; nor is such passive acquiescence such an encouragement to expend money in building the dam as will preclude the landowner from enjoining its maintenance when constructed.

From Polk: HENRY H. HEWITT, Judge.

Suit by Mary E. Hallock against Robert Sutor for an injunction. Decree for defendant and plaintiff appeals.

MODIFIED.

*NOTE.—See the case of *Pifer v. Brown*, 49 L. R. A. 497, to which is appended an extended note on the revokability of a license to maintain a burden on land after the licensee has incurred expense in creating the burden, and particularly pp. 523, 524 and 526 where the Oregon cases are considered.

A valuable note on the nature and revocation of parol licenses is printed with the case of *Lawrence v. Springer*, 31 Am. St. Rep. 702, 712. See, also, *Hathaway v. Yakima Water Co.* 53 Am. St. Rep. 374, 378, and *Buck v. Foster*, 62 Am. St. Rep. 477, 429.—REPORTER.

87	9
37	237
37	585
37	586
37	9
44	200
44	307
37	9
148	284

For appellant there was a brief over the names of *Ralph R. Duniway* and *J. N. Hart*, with an oral argument by *Mr. Duniway*.

For respondent there was a brief over the names of *Ed. F. Coad* and *Daly & Hayter*, with an oral argument by *Mr. Coad* and *Mr. John J. Daly*.

MR. JUSTICE MOORE delivered the opinion.

This is a suit to enjoin the defendant from maintaining and operating a dam constructed by him on plaintiff's premises in Polk County, and to restrain him from interfering with a water power thereon. It appears that La Creole Creek flows in an easterly direction through said premises, and empties into the Willamette River. The land drained by the headwaters thereof is covered with valuable timber, which, cut into saw logs and put into the creek, can only be floated therein in its natural stage during the winter freshets; but by means of dams provided with sluiceways of sufficient capacity, and so arranged as to permit logs to pass through, water can be raised at all times, except in the summer, to a sufficient height, so that when suddenly liberated it flushes the creek, carrying the logs to market. Plaintiff's husband, about 1867, built a sawmill on the premises now owned by her, which was operated by water power secured from said creek; and, having blasted rocks and removed obstructions from the bed thereof, he was able to supply his mill with logs, from which he manufactured lumber, and upon his death plaintiff succeeded to his estate in the premises, and continued the operation of the mill. The defendant about 1896 built a sawmill on said creek below plaintiff's mill, and, finding the head of water raised by two dams constructed by him insufficient to float logs thereto, constructed a dam in the creek on plaintiff's land, and is operating the same

thereon. Plaintiff alleges, in effect, that the closing of the dam built by the defendant on her land retards the flow of the water in the creek to such an extent as to hinder the operation of her mill in the summer, and that after the dam is filled the sudden opening of the gate causes the accumulated water to overflow her land, destroying the banks of the stream, and scattering logs and timber over her premises. The defendant, after denying the material allegations of the complaint, avers, in substance, that he built the dam upon plaintiff's land with her knowledge and consent. The reply having put in issue the allegations of new matter in the answer, a trial was had, and the court, from the testimony taken before it, found the facts, in effect, as hereinbefore stated, and, as conclusions therefrom, that defendant was entitled to float saw logs in said creek through plaintiff's premises to his mill, provided he did so without damage to her property; that he had the right to operate the three dams so constructed by him, retaining the water raised thereby for a reasonable length of time, for the purpose of floating saw logs in the creek when the water therein was in its natural condition; and that the plaintiff was entitled to the free use of said creek to float saw logs to her mill, and to use the water in the stream as theretofore in operating her mill. And, a decree having been rendered in accordance with such findings, the plaintiff appeals.

1. It is contended by plaintiff's counsel that La Creole Creek is not a navigable stream, and hence the court erred in decreeing defendant the right to float saw logs therein through their client's premises. In *Weise v. Smith*, 3 Or. 445 (8 Am. Rep. 621), it is held that when a stream is capable, in its natural condition, of being profitably used for any kind of navigation, its use to that extent is subjected to the general rules of law relating to navigation. "We hold the law to be," says Mr.

Chief Justice BOISE, in *Felger v. Robinson*, 3 Or. 455, "that any stream in this state is navigable on whose waters logs or timbers can be floated to market, and that they are public highways for that purpose, and that it is not necessary that they be navigable the whole year for that purpose to constitute them such. If at high water they can be used for floating timber, then they are navigable; and the question of their navigability is a question of fact, to be determined, as any other question of fact, by a jury. Any stream in which logs will go by the force of the water is navigable." To the same effect see *Shaw v. Oswego Iron Co.* 10 Or. 371 (45 Am. Rep. 146); *Haines v. Hall*, 17 Or. 165 (20 Pac. 831, 3 L. R. A. 609); *Nutter v. Gallagher*, 19 Or. 375 (24 Pac. 250). Without quoting from or commenting upon the testimony regarding the character of the creek, we think it clearly shows that it is navigable for logs within the meaning of the term as adopted by this court; and hence no error was committed in decreeing defendant the use of a common right through plaintiff's premises.

2. The decree protects plaintiff in the use of her mill by preserving her water power, and we are satisfied, from a careful examination of the testimony, that she has sustained no damage in consequence of the defendant's flushing the creek. We do not think, however, that defendant secured from plaintiff any license to construct a dam on her premises. To give to the testimony on this branch of the case every intendment claimed for it by the defendant, it amounts to no more than that he informed her of his intention to build a dam on her land, to which she made no objection. The plaintiff, being the riparian owner upon a stream navigable only for the purpose of floating logs, has, as appurtenant to such ownership of the bank, the exclusive right to dam the stream upon her premises, provided the floating of logs

by others is not obstructed thereby: *Lamprey v. Nelson*, 24 Minn. 304; *Kretzschmar v. Meehan*, 74 Minn. 211 (77 N. W. 41). And she cannot be deprived of such right except by her voluntary act or by condemnatory proceedings in the mode prescribed by law. It has been held in this state that if a party has been encouraged by any participation in a common enterprise, or induced by a definite oral agreement of the owner of a dominant estate to expend money in making permanent valuable improvements which may inure to his advantage, the parol license upon the faith of which he has acted in executing it cannot be revoked to his prejudice: *Curtis v. La Grande Water Co.* 20 Or. 34 (23 Pac. 808, 25 Pac. 378, 10 L. R. A. 484); *McBroom v. Thompson*, 25 Or. 559 (42 Am. St. Rep. 806, 37 Pac. 57); *Garrett v. Bishop*, 27 Or. 349 (41 Pac. 10). It is evident that defendant was not encouraged by plaintiff's participation in the construction of the dam, nor was he induced to expend money in making such improvement while relying upon the faith of any oral agreement by her, and hence he had no license to thus trespass upon her premises. The decree of the court below will therefore be modified, and the defendant perpetually enjoined from operating the said dam.

MODIFIED.

Argued 24 January; decided 12 March, 1900.

DOSE v. TOOZE.

[60 Pac. 380.]

87 18
42 808

GENERAL AND SPECIAL DAMAGES—PLEADING.

1. Under an allegation of pecuniary loss a party may recover those damages that are necessarily and inevitably sustained through the act complained of, which are designated general damages; while special damages are those which may naturally flow from the wrongful act or omission, but to be recoverable such must be specially claimed.

CONTRACTS IN RESTRAINT OF TRADE—EVIDENCE—DAMAGES.

2. In an action for breach of a contract not to re-engage in a business for a specified time, evidence of the quantity of goods purchased by defendant, and the

sum paid therefor, on re-entering the business, being merely a basis for estimating his profit or loss, is inadmissible, since the profit accruing to or the loss sustained by defendant after re-entering the business is not an element of plaintiff's loss, nor a measure of his damages.

IDEM.

3. In an action for breach of a contract not to re-engage in a business for a stipulated time, an instruction permitting a recovery of the difference between the price paid and the actual value of the property at the time of its purchase is erroneous, as it allows the jury to make a new contract for the parties by ascertaining the reasonable value of the property at the time of the purchase, which was not agreed on.

IDEM.

4. In an action for breach of a contract not to re-engage in a business for a specified time, an instruction that defendant, by loaning money to and performing service for a rival firm, breached his contract, is properly refused, as defendant could so act if he had no interest in the rival business, and such acts were only circumstances from which the jury might determine the relation existing between defendant and such rival business.

From Marion : GEO. H. BURNETT, Judge.

Action by Fred Dose against W. L. Tooze to recover damages for the alleged breach of a contract. The substance of the complaint is that on August 11, 1896, defendant was engaged in business at Woodburn, Oregon, as a produce merchant, dealing in grain, potatoes, and wool, and owned at that city and operated a warehouse in connection therewith, containing as fixtures, a boiler, engine, and other machinery, which property on that day, in consideration of \$1,500, he sold to plaintiff, and in the bill of sale evidencing the transfer stipulated not to engage, either directly or indirectly, in said business, in the cities of Woodburn, Hubbard, or Gervais, for the term of five years from said date; that plaintiff thereupon took possession of said building and machinery, and has been continuously ever since, and is now, doing business in said warehouse as a produce merchant, dealing in grain, potatoes, and wool; that about September 1, 1896, defendant violated his agreement by engaging in business at Woodburn as a produce merchant, dealing in said commodities, and, having advertised such occupation, he

has since continuously solicited the trade of his former customers in said cities and vicinity, thereby diverting patronage which plaintiff would have received, and destroyed the "good will" of his business; that the value of the building, machinery, etc., did not exceed the sum of \$700, and the price paid therefor would have been exorbitant if the purchase had not included such good will; and that by reason of defendant's wrongful acts plaintiff has sustained damage in the sum of \$4,900, for which he demands judgment. The answer having denied the material allegations of the complaint, a trial was had, resulting in a judgment for plaintiff in the sum of \$1, and he appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Messrs. Wm. M. Kaiser, Wm. H. Holmes, and J. C. Johnson.*

For respondent there was a brief and an oral argument by *Messrs. John A. Carson and Geo. G. Bingham.*

MR. JUSTICE MOORE, after stating the facts, delivered the opinion of the court.

At the trial, plaintiff called nine witnesses, by whom he proved that subsequent to August 11, 1896, defendant purchased from them, in the cities of Woodburn, Hubbard, and Gervais, such commodities as he had agreed not to deal in, but was not permitted to prove by them the quantity so purchased, or the sum paid therefor; nor allowed to call fifty other witnesses, whose attendance he procured, to testify in relation to the quantity or value of such commodities sold by them to the defendant after that date within said territory, which action of the court is assigned as error. This testimony was rejected on the ground that it would only tend to prove special damages,

and, plaintiff not having alleged that he sustained any loss of this character, such testimony was inadmissible under the *ad damnum* clause of the complaint.

1. General damages are such as a party necessarily sustains from the wrong of which he complains, and such as the law presumes would inevitably result from the act or omission of the adverse party causing the injury, and are recoverable under an averment in the complaint of plaintiff's pecuniary loss, without stating their particular nature: 5 Enc. Pl. & Prac. 717; *Wisner v. Barber*, 10 Or. 342; *Sunnyside Land Co. v. Willamette Bridge Ry. Co.* 20 Or. 544 (26 Pac. 835); *Barruso v. Madan*, 2 Johns. 145; *Dumont v. Smith*, 4 Denio, 319; *Laraway v. Perkins*, 10 N. Y. 371; *Prentiss v. Barnes*, 6 Allen, 410. Special damages, however, do not necessarily result from the wrongful act or omission of the adverse party, but are such as may flow from them as a natural and proximate consequence, caused by his negligence or design; and, as the law does not presume that such an effect will inevitably follow, it is incumbent upon the plaintiff to allege specifically in the complaint the facts constituting his special damages, in order that the adverse party may have notice thereof, and be prepared for trial: 5 Enc. Pl. & Prac. 719; 3 Sedgwick, Dam. (8 ed.) § 1261; 1 Sutherland, Dam. 763; *Salmon v. Olds*, 9 Or. 488; *O'Leary v. Rowan*, 31 Mo. 117; *Laing v. Colder*, 8 Pa. St. 479 (49 Am. Dec. 533).

2. Plaintiff's counsel, in support of their contention that the testimony so excluded was admissible under the allegation in the complaint of general damages, cite and rely upon the case of *Lashus v. Chamberlain*, 6 Utah, 385 (24 Pac. 188), which was an action to recover damages for the breach of a contract not to engage in the hotel business. In that case the evidence showed that plaintiff purchased a hotel from the defendant, who agreed not to

engage in the hotel business in the City of Ogden, Utah, as long as the plaintiff continued as proprietor of and operated said hotel under the name by which it was then known; that within fifteen months after such purchase plaintiff made a net profit of \$10,000 in operating the hotel, and found it necessary to increase the capacity of the house; that defendant erected a new hotel in close proximity to the one so sold by him, and, having opened it for the public, plaintiff's customers began to leave him, and to transfer their patronage to the defendant; and that plaintiff's loss, while defendant operated his hotel, amounted to \$6,150. Judgment having been rendered against the defendant for the sum of \$5,000, he appealed, contending that, inasmuch as the names of the persons whose patronage was so lost by his act were not given in the complaint, nominal damages only could be recovered under it. Mr. Justice ANDERSON, in deciding the case, says: "We think there was no special damage, as such, proved in the present case, but, even if there was, the defendant should have objected to the evidence when it was offered, and, having failed to do so, the objection was waived." In that case no attempt was made, so far as can be discovered, to prove how long any guest remained at defendant's hotel, or what sum, if any, he paid for the care and attention which he received, so that no greater latitude in the admission of testimony seems to have been given therein than was extended to plaintiff in the case at bar.

Another case relied upon by plaintiff's counsel is that of *Peltz v. Eichele*, 62 Mo. 171, in which it appears that Eichele, being the owner of a match factory at Saint Louis, Missouri, sold the same to plaintiffs, authorizing them to use the name of A. Eichele & Company, employed by him in conducting the business, and covenanted that he would

not enter into the manufacture of matches in said city for the term of five years, nor lend his name or skill to any other person so engaged, to the detriment of the business thus transferred. This covenant he violated by erecting a new factory in said city, and engaging in the manufacture and sale of matches under the name of P. Eichele & Company. Plaintiffs, having sold their factory and stock to him, commenced an action to recover damages for a breach of the covenant, alleging that defendant influenced the patrons of A. Eichele & Company to become patrons and customers of P. Eichele & Company, and thereby injured and destroyed the good will of the business so sold by him. The testimony introduced at the trial as tending to prove the damages sustained from the injury complained of related chiefly to the profits made by the defendant, his solicitation of orders for matches from his former customers, and the decline in plaintiff's business. Judgment having been rendered against the defendant for the sum of \$10,000, he appealed, assigning as error the action of the trial court in giving and refusing to give certain instructions. No exception appears to have been reserved to the introduction of testimony relating to the profits so made by defendant, nor do the instructions given or refused relate in any manner to that subject.

Mr. Justice HOUGH, speaking for the court, announces the following rule relating to the extent of the injury sustained: "What the plaintiffs have lost by the defendant's breach of covenant, and not what the defendant has gained thereby, is the legal measure of damages in this case. If the plaintiffs had manufactured matches to the utmost capacity of their factory, and sold all they made at unreduced prices, notwithstanding the defendant may have, in violation of his covenant, engaged in the same business in Saint Louis, and realized large profits, the

plaintiffs could only have recovered nominal damages; for, in that case, they would have lost nothing." The learned justice, in further commenting upon the method of computing the extent of plaintiff's injury, observes: "In ascertaining the amount of this damage, the profits made by the defendant constitute an element; but only such profits made by the defendant as the plaintiffs have lost by reason of the wrongful act of the defendant complained of in the petition. In ascertaining the profits lost to the plaintiffs, the profits made by the defendant may properly be given in evidence in connection with the diversion of customers from plaintiffs to defendant, and the amount of their purchases, the product of the plaintiff's factory, and the amount of their sales, and the reduction in the price of the articles sold, if any, in consequence of the unlawful competition of defendant." No objection having been made to the introduction of testimony concerning the profits made by defendant, nor any instruction requested upon the subject, what was said in relation to such profits constituting an element of damage was not necessary to a decision of the case, and was mere *obiter*. If the profits made by a party who had violated his contract respecting the good will of a business which he had sold constituted an element of damage, it would necessarily seem to follow that, if he conducted a competing business in such a manner as to keep up the running expenses only, and no profit accrued, he would not be liable for a breach of his covenant, regardless of how much injury he could thus inflict upon his credulous victim. The bare statement of the consequences which would result from the converse of such a proposition establishes its absurdity, and shows that, upon principle, the statement thus made, in a matter to which the court's attention was not particularly attracted, cannot be the law. In actions of this character the plaintiff seeks indemnity for the in-

jury he has sustained, and he is entitled to be compensated therefor, notwithstanding the defendant may also have sustained loss by the very competition which he has inaugurated: *Gregory v. Spieker*, 110 Cal. 150 (52 Am. St. Rep. 70, 42 Pac. 576). The quantity of the various commodities purchased by defendant, and the prices paid therefor, might have formed a basis for estimating the profits accruing or the losses sustained by violating his agreement; but, as such profits or losses do not constitute an element of plaintiff's loss, nor measure the extent of his damages, no error was committed in rejecting testimony on that subject.

3. It is stated in the bill of exceptions that testimony was introduced tending to show that the actual value of the warehouse, boiler, engine, machinery, etc., was less than the consideration named in the contract respecting the transfer of the same, and it is contended by plaintiff's counsel that the court erred in not instructing the jury, at their request, in effect, that, if they found from the evidence that defendant had violated his agreement, plaintiff was entitled to recover the difference between the price so paid and the actual reasonable value of said property at the time of the purchase, and also, in addition thereto, such other damages as the jury might be satisfied that he had sustained. In *Howard v. Taylor*, 90 Ala. 241 (8 South. 36), it was held that a charge which instructed the jury that, on proof of defendant's breach of an agreement not to engage in the same business elsewhere in the same town, the plaintiff was entitled to recover as damages the difference between the aggregate price paid and the value of the property received, other than the good will, in effect made the value of the good will the measure of damages, and was erroneous. See, also, *Taylor v. Howard*, 110 Ala. 468 (18 South. 311). If the court had given the instruction so requested, it would have permitted the jury to make

a new contract for the parties by ascertaining the reasonable value of the property at the time of the purchase, when no agreement had been reached in that respect; and, having reached a conclusion thereon, it would have permitted the jury to treat the difference between such value and the consideration paid as liquidated damages, in the absence of any stipulation to that effect: *Sedgwick, Dam.* (8 ed.) § 405; *Pengra v. Wheeler*, 24 Or. 532 (34 Pac. 354, 21 L. R. A. 726). The question of damages never having been the subject of calculation or adjustment between the parties, no error was committed in refusing to give such instruction.

4. It also appears from the bill of exceptions that defendant had loaned money to, and at different times performed service for, the Pennebaker Produce Company, plaintiff's business rival at Woodburn. The court refused to instruct the jury, as requested by plaintiff's counsel, that such loan and service constituted a breach of his agreement, but charged, in effect, that the defendant had a right to loan money to a business rival, and act as its servant, if he had no interest in and derived no profit from such business; but that the loan and service were circumstances from which the jury might determine the relation existing between the defendant and such business rival. In *Harkinson's Appeal*, 78 Pa. St. 196 (21 Am. Rep. 9), suit was brought to enjoin a mother from permitting or aiding her son to carry on the business of a bakery and confectionery in a ward in the city of Philadelphia. The evidence showed that the mother, having sold her bakery, covenanted not to engage in the same business, directly or indirectly, within the limits of the said ward, at any time within ten years from the date of said sale; but, by her advice and counsel, she would endeavor to encourage and promote the business interest of her vendee. Within that time, in pursuance

of a plan adopted with reference to her other children, she purchased a lot, built and fitted up a house thereon suitable for a bakery and confectionery, and gave the possession thereof to her son, with the understanding that, after he should be thoroughly established in business, he should pay her interest on the sum advanced, and in case of her death the property was to be his, but, if its value was more than he was entitled to, he was to make payment to his brothers and sisters of the excess. He thereupon took out a license as a retail dealer, and continued the business up to the hearing of the cause, at which the court, having found that the business was carried on in good faith by him, and not by his mother, and that no actual damage to plaintiff had been shown, denied the injunction and dismissed the bill. See, also, *Nelson v. Johnson*, 38 Minn. 255 (36 N. W. 868). In the case at bar the jury were at liberty, under the instruction given, to find that the defendant had a design to be interested in the business of the Pennebaker Produce Company, so as to bring his knowledge, skill and experience in competition with plaintiff in violation of his agreement; and, the jury having been properly charged in this respect, no error was committed in refusing to give the instruction so requested.

Plaintiff's counsel reserved exceptions to the court's refusal to give other instructions as requested, but, as they are embodied in the general charge, or considered inapplicable, it follows that the judgment is affirmed.

AFFIRMED.

Argued 29 January; decided 12 March; rehearing denied 9 April, 1900.

LOMBARD v. SMITH.

[60 Pac. 388, 707.]

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PENALTY FOR FAILURE OF WITNESS TO ATTEND—DAMAGES.

Under Hill's Ann. Laws, § 798, providing that a witness disobeying a subpoena duly served shall forfeit to the party requiring his attendance the sum of \$50 and all damages sustained, which forfeiture and damages may be recovered in an action at law, the payment to a witness of his fees and mileage is not sufficient to entitle the party requiring his attendance to recover the penalty for nonattendance, but it must be shown that the witness was material, and that damage other than the loss of such fees and mileage resulted from his nonattendance.

From Multnomah: E. D. SHATTUCK, Judge.

Action by B. M. Lombard against Edith J. Smith.
Defendant appeals from a judgment for plaintiff.

REVERSED.

For appellant there was a brief over the name of *Catlin, Kollock & Catlin*, with an oral argument by *Mr. John K. Kollock*.

For respondent there was a brief over the names of *Benjamin M. Lombard, in pro. per.*, and *Seneca Smith*, with an oral argument by *Mr. Smith*.

MR. JUSTICE BEAN delivered the opinion.

This is an action to recover from the defendant the penalty provided by Section 798, Hill's Ann. Laws, for a failure to attend court as a witness on behalf of the plaintiff, in obedience to a subpoena duly served upon her at his instance, in an action to which he was a party. Upon the trial the court ruled, and so instructed the jury, that, to entitle the plaintiff to recover, he must show that he was actually damaged by the nonattendance of the witness, but that payment of the witness fees and mileage at the time of the service of the sub-

pœna was a sufficient showing of damage for the purpose of such a recovery ; and this ruling presents the point for decision upon the appeal.

The statute provides that "a witness disobeying a subpoena duly served shall forfeit to the party requiring his attendance the sum of fifty dollars and all damages which he may sustain by the failure of the witness to attend ; which forfeiture and damages may be recovered by an action at law." A witness who has been duly subpoenaed and failed to attend, without due cause, is liable to a common law action for such damages as the party in whose behalf he was subpoenaed may have suffered by reason of his nonattendance : 24 Am. & Eng. Enc. Law (1 ed.), 170. And the statute is but declaratory of this rule, with a provision that the injured party, in addition to damages, may recover a penalty of \$50 from the defaulting witness. It is substantially the same as the statute of 5 Eliz. (2 Doug. 556), and of New York and Michigan (Code, Civ. Proc. N. Y. § 874 ; 2 Comp. Laws, Mich. 1857, p. 1175). It is true, these statutes provide that the defaulting witness shall forfeit to the party aggrieved, or that the penalty shall be recovered by the party so aggrieved, while ours provides that he shall forfeit to the party requiring his attendance, but they amount to substantially the same thing. The party aggrieved is the one who is injured by the nonattendance of the witness, and the party requiring his attendance is likewise one who is so injured. Under the statutes referred to, and an analogous statute of Iowa, the unbroken line of decisions is that the party can recover the statutory penalty only by showing that he was damnified by the failure of the witness to obey the subpoena. In other words, a party does not acquire a right to the statutory penalty by the mere refusal of the witness to attend when duly subpoenaed, but it must be shown that the witness

was material, and that damages resulted from his nonattendance: *Goodwin v. West*, 4 Cro. Car. 522, 540; *Courtney v. Baker*, 3 Denio, 27; *Carrington v. Hutson*, 28 Hun, 371; *Couling v. Coxe*, 60 Eng. C. L. 703; *Prentiss v. Webster*, 2 Doug. (Mich.) 5; *Heermans v. Williams*, 11 Wend. 636. In *Goodwin v. West*, 4 Cro. Car. 522, 540, which was an action on the statute of 5 Eliz., the exception taken by the counsel was that the plaintiff did not show that he was damaged by the nonappearance of the witness, to which it was "answered that the action being brought only for the ten pounds, and not for further damages, it is well enough; and the ten pounds is due for her nonappearance to the king and the party." But all the justices held that the declaration was ill for this cause; for there ought to be a party grieved by the nonappearance, otherwise there is no cause of forfeiture, and so are the express scope and words of the statute. And in *Courtney v. Baker*, 3 Denio, 27, which was an action under the New York statute, it was held competent for the defendant to show that he was unable to give material evidence in the case, and consequently no injury could have arisen from his nonattendance. The court said: "A party does not acquire a right to this penalty by the mere refusal of a witness to attend when duly subpoenaed. Something more is required. It must be shown that the witness was material, and that damages resulted from his nonattendance." And again: "If a defaulting witness was wholly unable to give material evidence in the case, it is manifest that no injury could have arisen from his nonattendance, and consequently he could not have incurred the penalty."

Nor is the payment to a witness of his fees and mileage such damages as are contemplated by the decisions referred to. In most, if not all, of the cases cited, the payment of such fees was an essential element of the proper service of the subpoena, notwithstanding which the court

held that the plaintiff was not entitled to the statutory penalty, because no damage was shown from the default of the witness. The statute provides for the recovery of the penalty from a witness who has been duly served with subpœna, and there can be no due service of a subpœna without either giving or offering to the witness at the time of the service the fees to which he is entitled for traveling to and from the place designated, and one day's attendance there: Hill's Ann. Laws, § 792. And, if the payment of such fees is a sufficient damage to entitle a party to recover under the statute, then it necessarily follows that a recovery of the penalty may be had without showing any injury or damage immediately consequential upon the nonattendance of the witness, which would be contrary to all the authorities upon the subject. It follows that the court erred in instructing the jury that the payment of the witness fees and mileage was sufficient damage to entitle the plaintiff to recover, and for this reason the judgment of the court below must be reversed, and a new trial ordered.

REVERSED.

Decided 9 April, 1900.

ON MOTION FOR REHEARING.

Messrs. Fenton & Muir, for the motion.

Messrs. Catlin, Kollock & Catlin, contra.

MR. JUSTICE BEAN delivered the opinion.

It is said the court did not instruct the jury, as a rule of law, that payment of witness fees and mileage was a sufficient proof of damages to entitle plaintiff to recover. The only knowledge we have on the subject is the record, which shows that the defendant requested in writing an instruction that "the payment to the defendant of her witness fees and mileage are not such damages as will

entitle the plaintiff to a verdict, and, unless you find other damages to said plaintiff, the verdict must be for the defendant." The court not only refused to instruct as requested, but in its charge called the attention of the jury to the contention of defendant in this regard, and instructed them that, "If you find that the plaintiff paid for the attendance of that witness \$2.20, you have a right to consider that as damages sustained by the party in the absence of the witness." The only reasonable interpretation we can give to these rulings is, as stated in the opinion, that the court intended to and did instruct the jury that payment of the witness fees and mileage at the time of service of the subpoena was a sufficient showing of damages. The other points discussed in the petition were made in the original brief. The authorities referred to were examined before the case was decided, and we were then, and are now, unable to concur in plaintiff's contention. The petition for rehearing is, therefore, denied.

REHEARING DENIED.

Decided 26 March, 1900.

BALTE v. BEDEMILLER.

[60 Pac. 601.]

SALES—WARRANTY OF TITLE—POSSESSION BY VENDOR.

1. Where personal property in the possession of the vendor is sold at a fair price, the law implies a warranty of title; but no such warranty is implied where a third person has possession.

SALES—BREACH OF WARRANTY—ATTORNEY'S FEES AS DAMAGES.

2. A vendee who, after an unavailing notice to his vendor, unsuccessfully defends the title that has been warranted to him, is entitled to recover from the vendor as part of his damages the amount paid his attorneys for making such defense: *Olds v. Curry*, 13 Or. 382, distinguished.

From Multnomah: E. D. SHATTUCK, Judge.

Action by Joseph Balte against Thomas Bedemiller for breach of warranty of title to a mare, originally com-

menced in the Justice's Court of Portland District, Multnomah County. It is alleged, in substance, that about April 1, 1897, plaintiff purchased a sorrel mare of the defendant, upon his representation that he was the owner thereof, paying him therefor the sum of \$20; that about July 1, 1897, one Christian Hollsifer claimed said mare, and demanded the possession thereof from plaintiff, who notified defendant of said demand and requested him to repay the purchase price, but he refused to do so, and denied that Hollsifer was the owner of said property; that about August 3, 1897, Hollsifer commenced an action against plaintiff, wherein he claimed and secured the immediate possession of said mare, whereupon plaintiff notified defendant of the nature and pendency of said action, and requested him to defend the same, which he refused to do, and plaintiff was compelled to employ counsel, who filed an answer denying the allegations of the complaint, and a trial being had, resulted in a judgment to the effect that Hollsifer was the owner of the mare, and entitled to retain the possession thereof, and to recover his costs and disbursements, taxed at \$11.90, whereby plaintiff (the defendant therein) lost the possession of said property; that the reasonable compensation, as attorney's fees, for the service performed by counsel so employed by plaintiff, is the sum of \$10; that defendant has not repaid any part of said purchase price, or paid any part of the said costs or attorney's fees, for which sums judgment was demanded. A demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action having been overruled, judgment was given as prayed for, which on appeal was affirmed by the circuit court for said county, and the defendant appeals to this court. **AFFIRMED.**

For appellant there was a brief and an oral argument by *Mr. Granville G. Ames*.

For respondent there was a brief over the name of *Stott, Boise & Stout*, with an oral argument by *Mr. Geo. C. Stout*.

MR. JUSTICE MOORE, after stating the facts, delivered the opinion of the court.

1. The complaint not having alleged that defendant was in the possession of the mare at the time of the purchase, it is maintained by defendant's counsel that no facts are stated from which a warranty of title can be implied, and that the court erred in overruling the demurrer. Plaintiff's counsel insist, however, that, the complaint having alleged that defendant represented himself to be the owner of the property, his statement to that effect is a warranty of title, requiring him to make good his affirmation, and hence the complaint was sufficient in that respect. The rule is pretty well settled in this country that on the sale, at a fair price, of personal property in the possession of the vendor, the law, in the absence of any statement or existence of facts or circumstances to the contrary, implies a warranty of title; but, where the property is in the possession of a third party at the time of the sale, no such warranty results, the rule of *caveat emptor* being applied: Benjamin, Sales (2 Am. ed.), § 641; Story, Sales (Perkin's ed.), § 367; 2 Kent, Comm. *478; 1 Parsons, Cont. (7 ed.) *574; *Scott v. Hix*, 2 Sneed, 192 (62 Am. Dec. 458, and notes). Blackstone, in speaking of implied warranties, says: "A purchaser of goods and chattels may have a satisfaction from the seller, if he sells them as his own and the title proves deficient, without any express warranty for that purpose:" 2 Blackstone, Comm. (3 ed.) *451. "It is also universally conceded," says Mr. Ben-

jamin in his work on Sales (section 627), "that, in the sale of an ascertained specific chattel, an affirmation by the vendor that the chattel is his is equivalent to a warranty of title." In *McCoy v. Artcher*, 3 Barb. 323, it is held that an affirmation of title by a vendor out of possession creates an implied warranty, and subjects the vendor to the same liability as if he had possession of the property. Mr. Justice PARKER, speaking for the court in announcing the decision, says: "A warranty should only be implied when good faith requires it. I think it is fair and equitable to hold that the possession of the vendor is equivalent to an affirmation of title, and that in such case the vendor shall be held to an implied warranty of title, though nothing be said on the subject between the parties. But if the property sold be at the time of the sale in the possession of a third person, and there be no affirmation or assurance of ownership, no warranty of title should be implied. If, however, there be an affirmation of title where the vendor is not in possession, the vendor should be subjected to the same liability as if he had the possession of the property."

The vendor's possession of personal property creates a presumption of his ownership (Hill's Ann. Laws, § 776, subd. 11), and a sale by him while so possessed, when nothing is said respecting the title, and no facts or circumstances exist tending to show that he did not intend to assert ownership, creates an implied warranty that he had a valid title; and if at the time of the sale a third party had a better title, and subsequently takes such property, or disturbs the purchaser's possession thereof, the vendor is responsible for the damages which result from a breach of such warranty (*Trigg v. Faris*, 5 Humph. 343). The right attaching to the warranty which the law implies from the vendor's possession of personal property, and his silence respecting his ownership, when he

effects a sale thereof, confer a remedy which compels him to respond in damages for a breach of such warranty. So, too, when the vendor affirms that he is the owner of an ascertained specific chattel, though not in his possession at the time of its sale, such representation is equivalent to an implied warranty of title: 2 Blackstone, Comm. (3 ed.) *451; Benjamin, Sales (2 Am. ed.), § 627. And the right attaching to such warranty confers a remedy which compels the vendor to make good his assertion in case of any breach of such warranty: *Byrnside v. Burdett*, 15 W. Va. 702. It does not clearly appear from an examination of the complaint that the mare was not in defendant's possession at the time of the sale; but, however that may be, the allegation of his assertion of ownership is tantamount to a warranty, which renders him liable for a breach thereof, and hence the complaint is sufficient in that respect.

2. It is contended by defendant's counsel, upon the authority of *Olds v. Cary*, 13 Or. 362 (10 Pac. 786), that plaintiff was not entitled to the expense incurred in the employment of an attorney, and that the court erred in rendering judgment for any sum on account thereof. In that case it appeared that Olds had been made a party defendant in a prior suit instituted by Cary to enjoin him from interfering with a certain inclosure, in the final determination of which the temporary injunction was dissolved, the suit dismissed and the costs and disbursements taxed to and paid by Cary. Olds thereupon brought an action upon the undertaking for the injunction, alleging that he had been compelled to employ counsel in defending the suit, and incurred an expense of \$150 on account thereof, which he sought to recover; and, having secured a judgment for that sum in the court below, Cary appealed, whereupon it was determined that a new trial should be ordered unless Olds remitted the sum of \$100—

this court having found that \$50 was a reasonable compensation for the expense occasioned in an unsuccessful effort made during the progress of the case to dissolve the preliminary injunction. An actual controversy existed between Olds and Cary respecting an inclosure, and to allow attorney's fees to the prevailing party, in excess of that prescribed by statute, would, in effect, compel the defeated party in every instance to bear all expenses of that character incurred by his adversary in the trial of a cause. A party, in order to maintain his rights in a suit or action, is ordinarily obliged to employ counsel; and the expense thereby incurred is probably caused by, but is not recoverable from, his adversary, except when made so by statute, or for services in special proceedings not going to the merits, as in the *Olds Case*. Olds' action having been predicated on a breach of the undertaking, its stipulations and conditions afforded the measure of his right; and, as that provided for the payment of such damages as he might sustain if the injunction was wrongful or issued without sufficient cause, the relief afforded was properly limited to the expenses necessarily incident to the preliminary injunction, and not to the defense of the suit on the merits: 2 Sutherland, Dam. 604; *Parker v. Bond*, 5 Mont. 1 (1 Pac. 209); *Trapnall v. McAfee*, 3 Met. (Ky.) 34 (77 Am. Dec. 152). In the action instituted by Hollsifer to recover the possession of the mare, Balte's defense was based upon Bedemiller's denial that Hollsifer was the owner. Balte and Bedemiller were not adverse parties in that action, but the latter having been notified of the nature and pendency thereof, and invited to make the defense, but having neglected to do so, the expense occasioned in the employment of counsel is attributable to his breach of the warranty of the title. If the purchaser defends the title against an action brought by a third party, of which the vendor had notice, the lat-

ter will be compelled to pay, in case the title fails, not only the price received, and interest thereon, but also the costs and expenses of the defense. Mr. Rawle, in his work on Covenants (4 ed. p. 308), in speaking of counsel fees incurred in defending the title, says, "Such costs have, however, been held in many cases to be recoverable as a part of the damages, although no notice of the adverse suit may have been given to the covenantor." The attorney's fees constitute a part of the damage which plaintiff sustained in consequence of the defendant's breach of warranty, and, judgment having been given therefor, the same is affirmed. **AFFIRMED.**

Argued 30 January; decided 26 March; rehearing denied 5 May, 1900.

COMMERCIAL NATIONAL BANK v. PORTLAND.

[54 Pac. 814, 60 Pac. 563.]

APPEAL—SERVING NOTICE ON ADVERSE PARTIES.

1. An appeal will not be dismissed because two of the defendants who suffered a decree to be entered against them by default joined with the other defendants in the notice of appeal, where their interests are adverse to those of the plaintiff, but are not adverse to the interests of their codefendants, and they will not be injured by a reversal of the decree.

VALIDITY OF EQUITABLE ASSIGNMENT OF FUND.*

2. An order from a contractor addressed to a city recorder, directing him to deliver to a certain company, from time to time, as certain street work should be accepted, warrants to be drawn by the city on the fund provided for that improvement, equal in amount to the value of materials to be furnished by said company and used in such work, is not an equitable assignment of the fund referred to or the contractor's claim thereon, for such order does not contain words of transfer, nor does it purport to assign any interest in the fund due, or that may become due, from such city to such contractor, on account of such improvement, nor is it directed to the debtor or custodian of the fund, nor is it an unconditional direction as to the disposal of the warrants: *McDaniel v. Maxwell*, 22 Or. 202, distinguished.

From Multnomah: **JOHN B. CLELAND**, Judge.

*NOTE.—When and to what extent an assignment of part of a fund or demand is enforceable is reviewed in the following annotated cases: *Harris County v. Campbell*, 2 Am. St. Rep. 472; *McDaniel v. Maxwell*, 28 Am. St. Rep. 740; *Avery v. Popper*, 71 Am. St. Rep. 849; *Warren v. First Nat. Bank*, 25 L. R. A. 746.

REPORTER.

Decided 24 October, 1898.

ON MOTION TO DISMISS APPEAL.

Mr. Harrison G. Platt, for the motion.*Mr. Ralph R. Duniway*, contra.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

1. This is a motion to dismiss the appeal. It appears that Terry & Dill, two of the defendants, joined with other defendants in the notice thereof, and it is now contended that, having suffered the decree to be taken against them for want of an answer, they cannot prosecute an appeal therefrom, and that, such being the case, it ought to be dismissed as to them. Nevertheless, it is further contended that they are necessary parties to the determination of the cause, without the presence of whom this court is powerless to proceed, and, therefore, that the appeal should be dismissed as to all parties: in other words, that because Terry & Dill are here as appellants, and not as respondents, the court should refuse to take cognizance of the cause. The reasoning is refined and quite technical, but it overlooks the pivotal conditions attending the appeal. Several defendants were united as coparties to the suit, among whom were F. E. Beach & Company, and Terry & Dill. The plaintiff was an adversary party from the inception of the proceeding, and by the adjudication, as shown by the decree, F. E. Beach & Company became also an adversary party to the other coparties defendant. The statute requires that the party appealing shall serve the adverse party, and this is sufficient to vest the appellate court with jurisdiction in the premises. We are not aware of any holding that it is necessary to serve a coparty with notice of the appeal where he is willing to join therein as appellant. Terry

& Dill may have lost their right of appeal by their default, but that fact, and the further fact that they are not adversary parties to the City of Portland and other coparties defendant, while they might be otherwise interested in the decree appealed from, ought not to deprive the City of Portland and other defendants of their right of appeal. If such was the law, all parties to the proceeding, except perhaps F. E. Beach & Company, would be without the right of appeal, simply because Terry & Dill have suffered default.

The complaint shows that the defendant Dill was the original contractor for the improvement of Umatilla Avenue in the City of Sellwood, later incorporated with the City of Portland; that Terry & Dill were partners, and that plaintiff's assignor furnished them a large amount of lumber and materials with which to make such improvement, for which they became largely indebted; that to secure such indebtedness they gave plaintiff's assignor an order upon the City of Sellwood for the delivery of warrants issued upon the fund provided for such improvement, and it is claimed that plaintiff thereby acquired an equitable assignment of a sufficient amount of such fund to satisfy its demand. A part of plaintiff's claim had been paid by warrants drawn by the city, and it prays a decree against the city and Terry & Dill for the balance due. The decree went against the city, but not against Terry & Dill, and yet they have no decree of dismissal, or for costs in their favor. That the plaintiff is an adverse party to the city is plain. Terry & Dill were adverse parties to the plaintiff from the inception of the suit, and coparties with the defendant the City of Portland, and, unless the decree changes the relationship, they are still adverse to the one and coparties with the other. But Terry & Dill have no judgment or decree in their favor and against

the City of Portland, and their condition could not be changed to their detriment by a modification or reversal of the decree at the instance of the city, and hence are not made adversary parties to the city by the decree. As to what might be the ultimate result of the litigation touching their interest, the court is not permitted to speculate. It is sufficient to know that a reversal or modification of the decree cannot affect them injuriously : *Alliance Trust Co. v. O'Brien*, 32 Or. 333 (50 Pac. 801). Terry & Dill were properly joined as appellants, and the motion to dismiss will therefore be overruled.

MOTION OVERRULED.

Decided 23 March, 1900.

ON THE MERITS.

In December, 1891, the City of Sellwood entered into a contract with one W. F. Dill for the improvement of Umatilla Avenue, a street in such city. In carrying out his contract, Dill purchased from the Columbia River Lumber & Fuel Company, and used in the work, lumber to the value of \$3,680.83, under a verbal agreement that he would give it orders for warrants on the fund for the improvement of the street as the work should be accepted. After a considerable portion of the lumber had been delivered, and in pursuance of such agreement, Dill gave the company the following order :

“PORTLAND, Oregon, February 23, 1892.

To J. D. Chapman, City Recorder of the City of Sellwood :

You will please deliver to D. J. Moore, Secretary of the Columbia River Lumber & Fuel Company, city warrants on the fund for the improvement of Umatilla Avenue in said City of Sellwood, in the State of Oregon, from time to time, as work on said avenue shall be accepted, and warrants ordered drawn, equal in amount to the value of the lumber furnished by said Columbia River Lumber

& Fuel Company, and used in making said improvements, now under way, to be evidenced by bills presented by said company and approved by me.

W. F. DILL."

This order was immediately filed with the city recorder, and has ever since remained in the custody of the City of Sellwood and its successor, the City of Portland. On May 26, 1892, Dill approved a bill for lumber amounting to \$1,537.73, and a warrant for that amount was issued by the City of Sellwood to the fuel company, but he refused to audit or approve any other bills for the company, and on the twenty-fifth of July, 1892, notified the city council that, "on account of nonfulfillment of contract I had with the C. R. L. & F. Co., I revoke all orders I have given them for warrants." Thereafter warrants were issued by the city for the balance due Dill on his contract, and delivered to him and his assignees, and the fund collected for such improvement was thereby exhausted. The fuel company subsequently commenced this suit against the City of Sellwood and others to recover the balance due for lumber furnished to Dill, on the theory that the order of February 23 operated as an equitable assignment of a portion of the fund for the improvement of the street sufficient to pay for the lumber so furnished. Thereafter the Commercial National Bank was regularly substituted as plaintiff, and the City of Portland, the successor of the City of Sellwood, as defendant, and, a decree being rendered for the bank, the city appeals.

REVERSED.

For appellant there was a brief over the names of *Joel M. Long* and *Ralph R. Duniway*, with an oral argument by *Mr. Long*.

For respondent there was a brief over the name of *Platt & Platt*, with an oral argument by *Mr. Harrison Gray Platt*.

MR. JUSTICE BEAN, after stating the facts, delivered the opinion of the court.

2. The only question for our decision is whether the order of February 23 amounts to an equitable assignment. At law, a part only of an entire demand cannot be assigned, so as to enable the assignee to bring an action upon it, without the consent of the debtor; but equity recognizes that in such case the assignee obtains by the assignment an interest in the property or fund, and permits such interest to be enforced by suit: *McDaniel v. Maxwell*, 21 Or. 202 (28 Am. St. Rep. 740, 27 Pac. 952). But the proof required of an assignment or transfer is the same at law as in equity. In either case there must be such a transfer or appropriation of the fund, or some definite part thereof, as to divest the assignor of any interest in or control over it, and to confer a complete and present right on the assignee. Mr. Pomeroy says that "there must be a specific fund, sum of money, or debt actually existing or to become so *in futuro*, upon which the assignment may operate; and the agreement, direction for payment, or order must be, in effect, an assignment of the fund, or of some definite portion of it:" 3 Pomeroy, Eq. Jur. § 1280. No particular form of words is necessary. Anything amounting to a present transfer of the fund, or a part thereof, for value, is a valid assignment in equity. If the transaction is, in effect, a sale, vesting a present interest in the assignee, it is sufficient, but a mere agreement or promise to be executed thereafter is not. "In order to constitute an equitable assignment," says the syllabus of *Hoyt v. Story*, 3 Barb. 262, "by a debtor to his creditor of a sum due to the debtor from a third person, there must not only be an agreement to pay the creditor out of the particular fund, but an appropriation of the fund, either by giving an order upon

it or by transferring it in such a manner that the holder would be authorized to pay it to the creditor directly, without the further intervention of the debtor:" And Mr. Justice SWAYNE, in *Christmas v. Russell*, 81 U. S. (14 Wall.) 69, 84, says: "An agreement to pay out of a particular fund, however clear in its terms, is not an equitable assignment. A covenant in the most solemn form has no greater effect. The phraseology employed is not material, provided the intent to transfer is manifested. Such an intent and its execution are indispensable. The assignor must not retain any control over the fund,—any authority to collect, or any power of revocation. If he do, it is fatal to the claim of the assignee. The transfer must be of such a character that the fund holder can safely pay, and is compellable to do so, though forbidden by the assignor. Where the transfer is of the character described, the fund holder is bound from the time of notice." See, also, *Clayton v. Fawcett's Adm'rs*, 2 Leigh, 19; *Christmas' Adm'r v. Griswold*, 8 Ohio St. 558; *Kimball v. Donald*, 20 Mo. 578 (64 Am. Dec. 209); *Ford v. Garner*, 15 Ind. 298; 3 Pomeroy, Eq. Jur. § 1280, *et seq.*

Applying these rules to the order under consideration, we are forced to the conclusion that it did not operate as an equitable assignment. It does not contain words of transfer, or purport to assign to the fuel company any interest in the amount due or to become due from the city to Dill, nor is it directed to the debtor or custodian of the fund. It is addressed to the city recorder, and is simply an order to him to deliver to the secretary of the fuel company from time to time, as work on the avenue shall be accepted, warrants thereafter to be drawn by the City of Sellwood, presumably in favor of Dill, on a certain fund, equal in amount to the value of the lumber furnished by the fuel company, and used in making such improvement. But, waiving this point, and assuming

that in this respect the order is sufficient to constitute an equitable assignment, the fatal objection remains that it did not vest in the fuel company a present right to the warrants, or authorize the city recorder to deliver them without the further approval of Dill. It is only upon the presentation of bills for lumber, approved by Dill, that the city recorder is authorized, under this order, to deliver warrants to the fuel company. The contract was not complete. Something remained to be done in the future by Dill before the right of the company to the warrants should become absolute. The city could not safely deliver to the fuel company, nor be compelled to deliver to it, any warrants, until its bills had been approved by Dill. The words "evidenced by bills approved by me" limited the authority of the city recorder to deliver warrants to the fuel company. It was only upon a certain condition that he was authorized to do so. Indeed, this interpretation seems to be in accordance with the actual intention of the parties. The evidence shows that at the time it was given the secretary of the fuel company desired an order on the recorder to deliver warrants to his company without any further act on the part of Dill, but Dill refused to give such an order, and the company accepted the present one upon the advice of the city attorney "that it did not make any difference what trouble Mr. Dill" and the company got "into over the bills; that, after filing this order with the recorder of Sellwood, he would hold these warrants in his possession until" they "had come to an agreement." It follows that the decree of the court below must be reversed, and it is so ordered.

REVERSED.

Argued 14 January; decided 2 April, 1900.

HARRIS v. SARGEANT.

[80 Pac. 608.]

SERVICE OF SUMMONS—SUFFICIENCY OF RETURN.

1. A return of service of a summons showing that it was served on minors by delivering to each of them a true and correct copy thereof is insufficient under Hill's Ann. Laws, § 55, subd. 3, requiring a summons to be served by delivering a copy thereof to the minor personally, since such return does not show personal delivery by the officer; hence the court acquired no jurisdiction of the persons of such minors by such service.

COLLATERAL ATTACK ON DECREE—EFFECT OF RECITALS.

2. Where a journal entry of a decree recited that minor defendants had been duly served as by law required, "as shown by the return of the sheriff," such return was made the basis of the recital, and was an essential part thereof; and, where such return was insufficient, such recital was not conclusive in a collateral attack on the decree entered thereon, since it then affirmatively appears on the face of the record that the court did not have jurisdiction.

From Polk: GEO. H. BURNETT, Judge.

Action by Sanford S. Harris and others against William Sargeant to recover real property. Both parties allege ownership in fee, and that they are entitled to possession. On November 15, 1884, William M. Harris was the owner thereof, and he and his wife on that day conveyed the same by quitclaim deed to their children, the plaintiffs herein. Subsequently one G. N. Townsend, a judgment creditor of the said William M. Harris, began a suit against him, Frances Harris, his wife, and the plaintiffs herein, to set aside said deed, and to subject the property to the satisfaction of his judgment. The summons was issued, and placed in the hands of the Sheriff of Benton County for service, who made the following return: "I hereby certify that I received the within summons on the ninth day of April, A. D. 1889, and served the same on the twenty-fifth day of April, A. D. 1889, in Benton County, Oregon, on the defendants S. S. Harris, L. E. Harris, and L. M. Harris, by delivering to each of said defendants a true and correct copy of said summons

prepared and certified to by me as sheriff, the above-named defendants being minors; also by delivering to their guardian, Mrs. Frances Kemp, for each of them, a true and correct copy of said summons, prepared and certified to by me as sheriff; also by delivering to the defendant S. S. Harris and his guardian, Mrs. Frances Kemp, each a copy of the complaint, prepared and certified to by C. G. Coad, County Clerk of Polk County, Oregon." An order was made in said cause, which, after reciting that, "it appearing to the court that said defendants have been duly served as by law required, to wit, by personal service upon defendants S. S. Harris, L. M. Harris, and L. F. Harris, and Frances Harris-Kemp, within the County of Benton, and State of Oregon, more than twenty days prior thereto, as shown by the return of the sheriff of said county and state," directed that default be entered against said defendants, and provided for the appointment of a guardian *ad litem* for the minors. Thereafter a decree was rendered in accordance with the prayer of the complaint, and the premises in controversy were sold to satisfy said judgment, the defendant herein becoming the purchaser, who subsequently obtained a sheriff's deed therefor. Judgment of the court below was for the plaintiffs, and defendant appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. William H. Holmes*.

For respondent there was a brief over the names of *W. Scott Beebe* and *Ephriam B. Seabrook*, with an oral argument by *Mr. Seabrook*.

MR. CHIEF JUSTICE WOLVERTON, after stating the facts, delivered the opinion of the court.

1. The question presented is whether the defendant acquired the legal title to the premises in controversy by and through the sheriff's deed, and its proper solution depends upon whether these plaintiffs were legally served with summons in said suit, which must be determined entirely from the record. The plaintiffs herein, who were defendants in the suit of *Townsend v. Harris et al.*, were all minors under the age of fourteen years at the time of the service of summons upon them in that cause. The statute requires the summons to be served by delivering a copy thereof, together with a copy of the complaint, prepared and certified to by the plaintiff, his agent or attorney, to such minor personally, and also to his father, mother or guardian, or, if there be none within this state, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is employed: Hill's Ann. Laws, § 55, subd. 3. In equity cases, where there is more than one defendant in the suit, service of the summons may be made by serving only one copy of the complaint, the same to be served on the defendant designated by the plaintiff, or his attorney, by a direction indorsed on such summons: Hill's Ann. Laws, § 390. Whether such an indorsement was made on the summons in question does not appear. The return of the sheriff shows that service was made by delivering to each of said defendants a true and correct copy thereof; also by delivering to their guardian, Mrs. Frances Kemp, for each of them, a like copy; and also by delivering to the said S. S. Harris and his guardian, Mrs. Frances Kemp, each a copy of the complaint, prepared and certified to by C. G. Coad, Clerk of Polk County. The return does not

show a delivery of the copy of the summons to the minors personally, which is made an essential requirement by the statute. The sheriff's showing that he delivered the summons to the minors may be all true, and yet the statute not be complied with, as he may have made the delivery through some third party, and therefore not personally. The service must conform to the requirements of the statute, as it will be construed strictly; and this must appear by the sheriff's return, otherwise the court does not acquire jurisdiction of the persons of such minors. The authorities appear to be in harmony with this view: *McMullin v. Mackey*, 6 N. Y. Supp. 885; *Womack v. Slade* (Tex. Civ. App.), 23 S. W. 1002; *Helms v. Chadbourne*, 45 Wis. 60, 67. The service being insufficient in the particular here ascertained, it is unnecessary to inquire into the effect of the nonappearance in the record of a proper indorsement on the summons, naming the defendant to whom the single copy of the complaint was required to be delivered.

2. It is further contended that, as the journal entry shows that the defendants were duly served as by law required, and the court in which the decree was given being one of general jurisdiction, it must be presumed that the court had other evidence than that which appeared from the return upon which to base its finding, and that such a finding is conclusive in a collateral attack. The finding, however, is specifically based upon the return, which reads, "It appearing to the court," etc., "as shown by the return." This, of itself, contradicts any presumption to the contrary, as the return is made the basis of the finding. The return is in the record, and is an essential part thereof, and, when reference is made to it as the basis of the finding, it becomes at once apparent that it does not support the finding. Thus it is made affirmatively to ap-

pear from the record that the court was without jurisdiction to render the decree, and it is, therefore, void as against minors: *Barber v. Morris*, 37 Minn. 194 (5 Am. St. Rep. 836, 33 N. W. 559); *Settlemier v. Sullivan*, 97 U. S. 444. These considerations affirm the judgment of the court below, and it is so ordered. **AFFIRMED.**

Argued 1 February; decided 9 April, 1900.

HUGHES v. PRATT.

[60 Pac. 707.]

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38	266
37	45
42	124

SCOPE OF DEMURRER TO ONE OF SEVERAL CAUSES OF SUIT.

1. Where a demurrer is specifically directed to the second cause of action contained in a cross bill, and the other causes of action therein are substantially the same as the second, the demurrer will be considered as if it went to the entire cross bill.

BILLS AND NOTES—EQUITABLE JURISDICTION—REMEDY AT LAW.

2. Where plaintiff, being sued as joint maker on notes, filed a complaint in equity in the nature of a cross bill, alleging that he was a mere surety, and that the holder was not a *bona fide* holder, the cross bill was properly dismissed, since plaintiff had an adequate remedy at law, by pleading and proving such defenses in the action at law on the notes.

From Multnomah: JOHN B. CLELAND, Judge.

In April, 1898, the defendant F. B. Pratt commenced an action in the Circuit Court of Multnomah County against Ellis G. Hughes, the plaintiff herein, to recover on a joint and several promissory note for \$20,000, in favor of John Green, executed by said Hughes, Charles E. Ladd and others, and assigned to him by Green. About the same time he began a like action upon a promissory note for \$5,500, in favor of Annie Breck, executed by the Chamber of Commerce, the payment of which was guaranteed jointly and severally by Hughes, Ladd and other persons. The two actions being consolidated, Hughes filed an answer, in which he admitted the execution by him of the two notes set out in the complaints,

and their transfer to Pratt, but denied that he was the *bona fide* holder. At the same time he filed the complaint herein, in the nature of a cross bill, against Pratt and Charles E. Ladd, in which he sets up, in substance, for a first cause of suit, that the money received from Green was borrowed by the parties to the note, other than himself, and used by them for their own private use and benefit; that he signed it as surety for Ladd and his associates, at their request, and to the end that they might obtain the money borrowed thereon for their own individual use; that all the signers of such note, except himself and Ladd, are now insolvent and unable to contribute anything to the payment thereof; that the defendant Pratt is liable, under some agreement, the exact form or terms of which plaintiff is unable to state, to contribute to any payment which Ladd may be compelled to make on account of the Green note, and is, to all intents and purposes, as to this plaintiff, a principal on the note with Ladd; that Pratt bought the note in the interest of himself and Ladd, for the sole and only purpose of suing this plaintiff thereon and attaching his property, knowing that he could not pay the same in the first instance without great sacrifice and loss, and with a view of compelling him to pay a considerable sum by way of compromise. The second cause of suit has reference to the Breck note, and is, in substance and legal effect, the same as the first, except it contains an allegation that this note was not the obligation of the Chamber of Commerce, but was, in truth and in fact, the note of the ostensible guarantors thereof, and that the plaintiff signed the same at the request of, and as surety for, Ladd and his associates. The third and fourth causes of suit are substantially the same. The plaintiff alleges therein that, though the defendant Pratt claims to own and hold the Green and Breck notes, as a matter of fact he took them for and in the interest

of the defendant Charles E. Ladd, and is prosecuting the actions thereon in the interest of Ladd, and for his use and benefit, in an attempt to aid him to collect a part of the notes from plaintiff, as such surety. The defendant Pratt moved to make the first cause of suit more definite and certain in some particulars, and demurred to the second, third and fourth on the ground that the facts therein set forth do not constitute a cause of suit against him, and that the allegations thereof show that the plaintiff has an adequate remedy at law. Ladd filed an answer in abatement, alleging that at the time of filing the cross bill there was pending and undetermined in the Circuit Court of Multnomah County another suit between himself and the plaintiff Hughes, wherein the same questions sought to be litigated in this case were in issue. Plaintiff demurred to Ladd's answer on the ground that it did not state facts sufficient to constitute a defense to the cross bill. The motion and demurrer by Pratt were sustained, and the demurrer of plaintiff to the plea of abatement by Ladd overruled; and, the plaintiff declining to amend or plead further, a decree was entered dismissing the cross bill, from which plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the names of *Messrs. Ellis G. Hughes, in pro. per., and R. & E. B. Williams*, with an oral argument by *Mr. Hughes and Mr. Richard Williams*.

For respondents there was a brief over the name of *Williams, Wood & Linthicum*, with an oral argument by *Messrs. Geo. Henry Williams and Stewart Brian Linthicum*.

MR. JUSTICE BEAN, after stating the facts, delivered the opinion of the court.

1. The decree of the court below indicates that Pratt's demurrer was treated as if it went to the entire cross bill, and, while it is not specifically directed to the first cause of suit, it may be consistently considered as challenging its sufficiency, because the second cause of suit is substantially the same as the first, to which the demurrer is specifically directed.

2. The argument in support of the demurrer is that the facts alleged do not constitute a defense requiring the interposition of a court of equity, and that all the questions therein tendered can be tried out at law, and as a defense to the law actions. In this view we concur. The substance of the cross bill is that the plaintiff was not a joint maker of the notes sued on, but a mere surety for Ladd and his associates, and that Pratt, who now claims to be, and is, the holder thereof, is, in truth and in fact, either jointly interested with Ladd as a maker, or purchased and now holds them as his agent and representative, and prosecutes the actions thereon in that capacity. These are all matters which can be set up as a defense to the law action, wherein parol evidence is admissible to show the real relation to the contract, and Pratt's interest in the notes: *Holmes v. Goldsmith*, 147 U. S. 150 (13 Sup. Ct. 288); *Hale v. Forbis*, 3 Mont. 395; *First Nat. Bank v. Gaines* (Ky.), 9 S. W. 396; *Harrison v. Morrison*, 39 Minn. 319 (40 N. W. 66). In *Holmes v. Goldsmith*, 147 U. S. 150 (13 Sup. Ct. 288), it was held that parol evidence was admissible to show that a promissory note made by certain parties to the order of W. F. Owens was in truth and in fact made for a loan to Owens by the plaintiffs, who were not named in the note at all; that the defendants executed it for the accommodation of

Owens, the real debtor, to enable him to procure such loan; and that he never had any cause of action on said note against the defendants. A principal upon a promissory note cannot, of course, sue his surety for what he has paid or is liable to pay upon his own note. If, therefore, Hughes was in fact a surety for Ladd, as the cross bill alleges, and Ladd had brought an action at law in his own name to compel Hughes to pay, the fact that he was surety would be a perfect defense. Under the allegations of the complaint, the notes were transferred to Pratt after they became due; and he either holds them as the agent of Ladd, or, as to Hughes, is a principal upon the notes with Ladd. If this allegation is true,—and for the purpose of this demurrer it must be so considered,—then he certainly has no more right to sue plaintiff than Ladd would have, and the plaintiff can make any defense to the notes in the hands of Pratt that he could as against Ladd. Testing the sufficiency of the cross bill by these views, it is apparent that it does not state facts sufficient to constitute a cause of suit, but that plaintiff has a full, complete, and adequate remedy at law. It follows that the decree of the court below must be affirmed, and it is so ordered.

AFFIRMED.

Argued 1 February; decided 9 April; rehearing denied 15 August, 1900.

LADD v. CHAMBER OF COMMERCE.

[60 Pac. 713, 61 Pac. 1127, 62 Pac. 208.]

PRINCIPAL AND SURETY—CONTRIBUTION BETWEEN COSURETIES.

1. Where some of the sureties on a bond borrow money on their personal credit and use it to prevent a breach of the bond by the principal, other sureties who did not join in such proceeding cannot be compelled to contribute to the repayment of the money so borrowed. Each surety is bound by the original contract, and is entitled to determine for himself the course to be pursued in case of a threatened breach of the bond.

CHANGING RELATION OF COSURETIES BETWEEN THEMSELVES.

2. The fact that the owner of a building in course of erection who holds a bond executed by several persons to secure its erection and completion, gives to

37 OR.—4.

37	49
42	124
42	138

the sureties the charge of the construction and control of the funds provided therefor, does not change the relation of the sureties as between themselves so that a part of them can contract obligations binding on all.

RATIFICATION.

3. Before there can be a ratification there must have been something done on behalf of or in the name of the person ratifying.

CONTRIBUTION—PAYMENT BY COSURETY.

4. A surety cannot, except under peculiar circumstances, maintain a suit for contribution against a cosurety until he has paid the obligations to which the cosurety is asked to contribute.

SURETY—ENFORCEMENT OF CONTRIBUTION.

5. Though a surety may in some instances, without payment, compel a co-obligor to pay his portion of a common obligation (*Thompson v. Dekum*, 32 Or. 506, cited), yet that remedy is not available where the person to whom payment should be made is not a party to the suit, and the person seeking contribution has not paid more than his share of the obligation.

From Multnomah: JOHN B. CLELAND, Judge.

This is a suit brought by Charles E. Ladd, individually, and Caroline A. Ladd, William M. Ladd, Charles E. Ladd, and John Wesley Ladd, executrix and executors of the last will and testament of W. S. Ladd, deceased, against the Chamber of Commerce, a corporation, C. P. Bacon, Charles H. Dodd, T. M. Richardson, J. E. Haseltine, C. M. Idleman, Herbert Bradley, F. K. Arnold, R. L. Durham, J. L. Hartman, Samuel Heitshu, D. D. Oliphant, D. Solis Cohen, and Ellis G. Hughes. The prayer of the complaint is that the amount of the several obligations that have been assumed for and on behalf of the Chamber of Commerce by the plaintiff Charles E. Ladd and by W. S. Ladd, the testator of the other plaintiffs, and the defendants other than the Chamber of Commerce, under and by virtue of a certain bond to the New York Life Insurance Co., be ascertained and fixed; that the building of the Chamber of Commerce be sold, subject to the lien of a mortgage in favor of the New York Life Insurance Co., and the net proceeds thereof applied on the indebtedness referred to; that the court ascertain and fix the due and equitable

proportion which should be contributed by each of the defendants, other than the Chamber of Commerce, toward the payment of the amounts advanced by the plaintiff Charles E. Ladd to pay and discharge certain obligations incurred by himself and the defendants, except Hughes, on behalf of the Chamber of Commerce, and the retirement of certain outstanding obligations to which the plaintiff Charles E. Ladd, and W. S. Ladd, deceased, are parties. The defendant Hughes, who alone answered, denies any liability on account of the matters or things set out in the complaint. The facts out of which the controversy between him and the plaintiffs arose are as follows: The Chamber of Commerce is a corporation, organized under the laws of the state. In 1890 it purchased lots 3, 4, 5 and 6, in block 46, in the City of Portland, and during that year determined to erect a building thereon, selected an architect, chose a design and awarded a contract for putting in the foundation of such building. The business of the corporation was conducted by and through a finance committee, which, in January, 1891, consisted of the appellant Hughes, the defendants Haseltine, Bradley, Durham, Oliphant, Arnold, Idleman, Cohen, Heitshu, Bacon, and Richardson, and W. S. Ladd, T. F. Osborn, E. Quackenbush, and George B. Markle. At that time the assets of the Chamber of Commerce, independent of its real estate, consisted of about \$21,000 in cash, and its liabilities amounted to about \$50,000. Negotiations with the New York Life Insurance Co. for a loan of money sufficient to complete the building resulted in a proposition from the insurance company to the committee to loan \$450,000 at six per cent. for five years: \$100,000 to be paid when the papers were signed, \$140,000 when the building was erected and roofed and the cement floors put in, \$70,000 when the white plaster was on, \$40,000

when the standing trim was on, and \$100,000 when the building was entirely completed; the corporation to pay all taxes and expenses, the salary of the inspector of the insurance company, not to exceed \$3,000, and to furnish a bond guarantying the completion of the building within two years, and the creation of a sinking fund.

This proposition was accepted in April, 1891, and upon the suggestion of appellant Hughes, that, if the finance committee were to furnish the desired guaranty, the construction of the building should be left in its hands. The Chamber of Commerce, on April 13, 1891, adopted the following resolution :

“Whereas, the arrangement made by the Chamber of Commerce of Portland, Oregon, with the New York Life Insurance Company, for the necessary funds to complete the Chamber of Commerce Building, requires a personal guaranty that the funds loaned the Chamber of Commerce shall be properly expended in the erection of the said building, and not otherwise; and,

“Whereas, W. S. Ladd, G. B. Markle, Samuel Heitshu, Chas. H. Dodd, D. Solis Cohen, E. Quackenbush, F. K. Arnold, T. F. Osborn, C. M. Idleman, J. E. Haseltine, T. M. Richardson, Ellis G. Hughes, R. L. Durham, C. P. Bacon, and Herbert Bradley have agreed to furnish the New York Life Insurance Company the aforesaid guaranty on behalf of the Chamber of Commerce; now, therefore, be it

“Resolved, that W. S. Ladd, G. B. Markle, Samuel Heitshu, Chas. H. Dodd, D. Solis Cohen, E. Quackenbush, F. K. Arnold, T. F. Osborn, C. M. Idleman, J. E. Haseltine, T. M. Richardson, Ellis G. Hughes, R. L. Durham, C. P. Bacon, and Herbert Bradley, or such of them as may sign the said guaranty, be placed in full control of all the funds derived from the New York Life Insurance Company, and of the construction and erection of the Chamber of Commerce Building until the completion thereof, with full power and authority to act in the premises, and to distribute the said funds for the

erection of said building; that said power and authority shall be irrevocable, except for cause, shall be reduced to writing, and to that end the president and secretary are hereby authorized to execute the necessary papers on behalf of this chamber, and to attach the seal of this corporation thereto."

On May 16, 1891, in pursuance of this resolution, and in order to effect the loan from the insurance company, the Chamber of Commerce, as principal, and the defendants Haseltine, Durham, Richardson, Cohen, Dodd, Idleman, Bradley, Arnold, Heitshu, and the appellant, Hughes, together with W. S. Ladd, T. F. Osborn, and George B. Markle, as sureties, executed and delivered to the New York Life Insurance Co. their penal bond in the sum of \$900,000, as follows:

"Know all men by these presents, that we, the Chamber of Commerce of the City of Portland, State of Oregon, a corporation, duly organized and existing under the laws of the State of Oregon, and having its principal office in the City of Portland, in said state, as principal, and W. S. Ladd, G. B. Markle, S. Heitshu, C. H. Dodd, D. Solis Cohen, C. M. Idleman, E. Quackenbush, F. K. Arnold, T. F. Osborn, J. E. Haseltine, T. M. Richardson, E. G. Hughes, C. P. Bacon, H. Bradley, and R. L. Durham, as sureties, are jointly and severally held and firmly bound unto the New York Life Insurance Co. in the sum of nine hundred thousand (\$900,000.00) dollars, lawful money of the United State of America, to be paid to the said New York Life Insurance Company, its successors or assigns, in gold coin of the United States at its present standard of weight and fineness, for which payment, well and truly to be made, we do bind ourselves and our respective heirs, executors, administrators, successors, or assigns, jointly and severally, firmly by these presents. Sealed with our seals, and dated this 16th day of May, A. D. one thousand eight hundred and ninety-one. The condition of the above obligation is such that: (a) If the above-bounden Chamber of Commerce, its successors or

assigns, shall complete or cause to be completed its brick and stone building on Stark Street, between Third and Fourth Streets, in the City of Portland, Oregon, on lots three (3), four (4), five (5), and six (6), in block forty-six (46), of said city, to cover the full plat, 200x100 feet, in accordance with the plans, specifications, and designs heretofore submitted to the obligee, or as modified from time to time by consent of the said Chamber of Commerce and the said New York Life Insurance Co., within two years, strikes and other unavoidable casualties which cannot be met and overcome only excepted; (b) and shall pay or cause to be paid all liens, whether of mechanics, laborers, material men, or others, as well as all debts and obligations which are or may become a lien or charge upon said building or the land whereon the same is situate, before said obligee shall be called upon to make its final payment on the loan by it made to the said Chamber of Commerce in accordance with the terms, conditions, and ageements of a certain mortgage from the Chamber of Commerce to the New York Life Insurance Co., the said obligee herein, bearing even date herewith; (c) and shall guaranty that the full amount, four hundred and eighty thousand dollars, which the said Chamber of Commerce has represented and does hereby represent, unto the said New York Life Insurance Company, that the construction of said building will cost, shall be expended on said building, together with such additional sums as may be required to properly finish and complete it in accordance with the plans, specifications, and designs of the architect, as heretofore submitted by said Chamber of Commerce to said New York Life Insurance Company; (d) and in case any liens of any nature shall be filed against said property during the construction of said building, or after its completion, upon notice thereof, and the request by the attorney of the said New York Life Insurance Company, the parties signing this bond as sureties shall deposit with the County Clerk of Multnomah County, Oregon, the amount of such lien or liens, and accrued costs thereon, within ten days from the date of such notice, and demand upon them, which amount so deposited shall be applicable to the satisfaction of such

lien or liens and costs and charges,—then the above obligation to be void ; otherwise, to remain in full force and virtue. In witness whereof, the said Chamber of Commerce, principal, has caused its corporate name to be subscribed by its proper officers thereunto duly authorized, and its corporate seal to be hereto affixed, and the said parties described as sureties have set their hands and seals the day and year hereinbefore written.”

On June 12, 1891, the first payment, of \$100,000, was received from the insurance company. In July, the sureties on the bond, acting as the finance committee and agents of the Chamber of Commerce, awarded contracts for the construction of the building, amounting to about \$475,000, and proceeded with the work. The appellant, Hughes, participated in the deliberations and acts of the committee until November, 1891, when he went to Europe, and did not return to Oregon until September 1, 1894, after the building was entirely completed and accepted. He remained a member of the finance committee, however, except for a short time in the early part of 1894. During his absence the other members of the committee, consisting of his cosureties on the bond and one or two other persons, in order to put the building in condition to entitle the Chamber of Commerce to the second installment due on the loan from the insurance company, borrowed the sum of \$90,000, and gave their individual, joint and several promissory notes, respectively, to the London & San Francisco Bank for \$60,000 and the Bank of British Columbia for \$30,000 therefor. They then proceeded with the construction of the building until January, 1893, when W. S. Ladd died, and the plaintiff Charles E. Ladd was elected to the vacancy on the committee caused thereby. Thereafter the members of the committee again borrowed on their individual, joint and several promissory notes, of the London & San Francisco Bank, an additional

\$60,000, and of Donald Macleay \$10,000, for use in the construction of the building, payment of interest, taxes, and other expenses incident to the work ; and, in order to pay off the contractors and material men, and thus clear the building so as to entitle the Chamber of Commerce to the last installment from the insurance company, they executed and delivered to such contractors and material men their individual, joint and several promissory notes, amounting to about \$60,000. All the money borrowed was paid over to the treasurer of the Chamber of Commerce, and disbursed upon warrants, the same as other funds of the corporation, and the members of the finance committee were credited therewith. None of these notes were signed by the appellant, Hughes, nor were they given at his instance or request, or with his knowledge.

On April 17, 1893, however, Mr. Arnold, a member of the finance committee, and a cosurety with the appellant, advised him by letter that "the building is approaching completion, and we hope to have it ready for occupancy in about sixty days. We are going to be from \$175,000 to \$200,000 short in funds when the building is finished. The financial committee have carried about this amount as a loan for the last year, and Markle's idea now is that we can place that in the form of a second mortgage, to be guaranteed by the finance committee personally. At the end of three years from now, when the New York Life mortgage matures, we shall have paid upon that at least \$100,000, and then we can make a new mortgage consolidating the two, and thus relieve ourselves of the responsibility." On September 13, 1893, after the building had been completed and accepted, Mr. Arnold again wrote him concerning the matter, saying : "The financial part of the business is not so satisfactory as we might wish. After getting all our money from the New York Life, we find ourselves short about \$190,000,

for which the finance committee have signed and are to sign notes. The building has cost us something like \$70,000 or \$80,000 more than the estimate, and you will remember that in figuring out our assets, and what we had to pay with, we have always counted upon placing the \$100,000 of unsubscribed stock. Of course, at the present time, it is out of the question to sell this for anything, and all we can do is to carry the indebtedness the best we can until times improve so that we can sell the stock or float a second mortgage indorsed by a committee. This indebtedness is now distributed about as follows: To the London and San Francisco Bank, \$90,000; to the Bank of British Columbia, \$30,000; to Donald Macleay, \$10,000; to Kenneth Macleay, \$5,000; to Arthur Johnson & Brother and sundry subcontractors' notes, at three and four months, in small sums, aggregating \$60,000.

* * * Several of the finance committee have alluded to the fact that you are away, and have not signed any of these obligations. I have taken the liberty of referring them to your letter which you sent me soon after you went abroad, and in which you tendered your resignation as a member of the committee, or, if we decided not to accept your resignation, to remain as a member, and assume your share of whatever responsibility the other members of the committee might be called upon to assume. I hope I have not exceeded your intention in this statement, as I merely gave my understanding of your letter. The alternative of not signing the short-time notes which have been given the contractors in settlement was to have the building covered with liens amounting to about \$161,000, which amount, under the terms of our contract with the New York Life, we should have been obliged to pay in court within ten days from the filing of the liens, and, while no one likes to sign \$60,000 notes maturing in three

or four months, yet we preferred to do this, hoping things would brighten up at that time, rather than take the other horn of the dilemma."

In answer to this last letter, Mr. Hughes, on December 30, 1893, wrote to the finance committee as follows: "Having remained a member of your body during my absence from the City of Portland from November, 1891, to the present time, and having, by reason of such absence, failed to execute such contracts and obligations as it has been found necessary for you to execute and assume individually, and, as a committee, in carrying on the work of erecting and completing the Chamber of Commerce Building, I hereby obligate myself that, being allowed to remain a member of your body, I will, immediately on my return home in the spring or summer of 1894, bind myself on all contracts and obligations executed by you all in your individual capacity, or individually as a committee, and connected with said Chamber of Commerce Building, or in any wise appertaining to its construction or erection, and then outstanding, by signing such contract or obligation as a party to and co-obligor therein; and that I will, as soon after my return as at all practicable, pay my proportionate share of any and all amounts which may have been paid by you, and each and every one of you, either acting as a body or each for himself in that behalf, which have been paid from your own private funds or resources on account of any contract or obligation made or assumed on account of or in connection with the building and operation of said Chamber of Commerce Building, and not then reimbursed; nevertheless, conditioned on my receiving on account thereof my proportionate interest, and the same interest as each and every one of you, on and in any and all claim or claims held by you against said Chamber of Commerce Building of said Chamber of Commerce of the City of

Portland by reason of the payment or payments made by you as aforesaid.' In January, 1894, Mr. Honeyman was elected a member of the finance committee in place of Mr. Hughes, but on March 6, Mr. Hughes' letter being presented and read, he was thereupon elected a member to fill a vacancy caused by the resignation of T. F. Osborn, and has since continued to act as a member of the committee, and to participate in its deliberations. In March, 1895, the Chamber of Commerce being without funds, and it being necessary to raise money with which to pay interest, taxes, and other expenses, the members of the finance committee borrowed of John Green \$20,000, and in January, 1897, of one Annie Breck \$5,500, giving their individual, joint and several promissory notes, each of which was signed by the appellant, Hughes, with the other members of the committee. The notes given for the amounts due the contractors and material men were taken up and paid by Charles E. Ladd, one of the makers thereof, prior to the commencement of this suit. The other notes were still outstanding and unpaid, but those signed by W. S. Ladd had been presented and allowed as claims against his estate. The cause was tried practically upon a stipulation of facts; from which it appears that all the defendants except Bacon, Richardson, Haseltine, and Hughes are insolvent. The court below held Hughes was, in equity, liable with his cosureties on the bond to the insurance company for the amount of money borrowed by them to complete the Chamber of Commerce Building, and entered a decree apportioning the amount between him and the other solvent sureties, from which he appeals.

REVERSED.

For appellant there was a brief over the names of *Ellis G. Hughes, in pro. per.*, and *R. & E. B. Williams*, with an oral argument by *Messrs. Hughes and Richard Williams*.

For respondents there was a brief over the name of *Williams, Wood & Linthicum*, with an oral argument by *Messrs. George H. Williams and Stewart B. Linthicum*.

MR. JUSTICE BEAN, after making the foregoing statement of facts, delivered the opinion.

Although the record and briefs are voluminous, and the argument of counsel has taken a wide range, the real merits of the controversy lie within a narrow compass. The plaintiff's claim against Hughes is predicated upon the bond to the New York Life Insurance Co., which he, W. S. Ladd and others executed as sureties for the Chamber of Commerce on May 16, 1891. The contention is that the sureties on such bond, in effect, undertook and agreed that they would, if their principal did not, complete, or cause to be completed, within two years, a stone building for its use and benefit, to cost not less than \$480,000, according to certain plans and specifications, and, therefore, to use the language of counsel, they were "bound to procure, and, if necessary, to borrow, the money to complete this building within the time specified; and, if a part of the sureties paid out money in the performance of this obligation, the other sureties are liable for contribution." In short, the position of the plaintiffs is that by signing the bond the sureties entered into an independent obligation upon their part to procure and furnish the necessary funds to erect and complete the building within two years from the date thereof. But we do not so understand the contract of the sureties. The obligation is an ordinary penal bond, with the Chamber of Commerce as principal and certain persons as sureties, to be void in case the obligor and principal thereof shall erect and construct a certain building on property belonging to it, at a cost of not less than \$480,000, within a certain time,

and pay all liens or claims which might become liens thereon. The only independent covenant on the part of the sureties is that, in case liens of any nature shall be filed against the property during the construction of the building, or after its completion, "upon notice thereof, and the request by the attorney of the said New York Life Insurance Co.," they will "deposit with the County Clerk of Multnomah County, Oregon, the amount of such lien or liens and accrued costs thereon, within ten days from the date of such notice and demand upon them." It is not pretended that there was any breach of this stipulation, and it need not be further considered in the case.

1. As to the other conditions of the bond, the agreement of the sureties is, in legal effect, to pay to the insurance company such damages as it might sustain in case of a breach thereof by their principal. They did not obligate themselves to perform such conditions. That was the contract and duty of the principal alone, and the sureties were only liable to the obligee in case it failed to perform them. Nor did they undertake or agree to erect the building, or to pay the contractors or material men, but only to answer to the insurance company for such damages as it might sustain if the Chamber of Commerce failed to do so. Their liability was to the insurance company alone, and there is neither allegation nor proof that it ever made or had any claim for damages under the bond. But it is argued a breach of the bond and consequent damages to the insurance company would have occurred if certain of the sureties had not pledged their individual credit for money with which to complete the building. This may be true, although it does not appear, except inferentially, that the Chamber of Commerce could not have provided sufficient funds for that purpose on its own credit if it had been requested to do so. The

finance committee, composed principally of sureties on the bond, seems to have voluntarily borrowed the money, and paid the obligations of the Chamber of Commerce upon their own responsibility, and without consulting their principal. But, assuming that, if they had not done so, there would have been a breach of the bond, it does not follow that the action of a part of the sureties in borrowing money for the Chamber of Commerce to use in the construction of the building would bind a nonparticipating surety. The borrowing sureties could determine for themselves the necessity or desirability of doing so, but they had no authority to determine that question for Hughes, and bind him by their acts. There was no agreement between the sureties by or under which such authority was granted, nor anything in the bond authorizing one surety to act in this regard for another, or the majority for all. Each surety had a right to stand upon the letter of his contract, and, in case of a breach or threatened breach of the bond, to exercise his own judgment as to whether it was better for him to suffer default and answer in damages to the obligee in the bond, or to become liable on a new obligation. His cosureties could not determine that question for him. They were not his agents in any sense of the word. By signing the bond, he became liable, as before stated, to the New York Life Insurance Co. in case of a breach thereof, and not to his cosureties, except under the doctrine of contribution. Neither the obligee nor the obligor in the bond could vary or enlarge the liability of a surety; and there is certainly nothing in the relation of cosureties, one to the other, which to any extent, or on any ground, authorizes one to act for or bind the other.

Where one surety is compelled, by the maturity of an obligation and the failure of the principal to perform, to pay or discharge a common debt he has a right of cou-

tribution from his cosurety; but this right rests on principles of natural justice, and not contract: *Durbin v. Kuney*, 19 Or. 71 (23 Pac. 661); *Thompson v. Dekum*, 32 Or. 506, 513 (52 Pac. 517, 755). There is no contractual relation between sureties enabling one to discharge a common obligation at his own pleasure and in his own way, and thereby bind the other. The whole right of contribution rests upon the doctrine of compulsory payment. Where one surety is compelled to pay, the nonpaying surety is required to contribute in proportion to the benefit received by him. But this obligation is raised by the necessity which the paying surety was under of making the payment, and therefore he can have no contribution unless his payment was compulsory: *Halsey v. Murray*, 112 Ala. 185 (20 South. 575); *Bancroft v. Abbott*, 3 Allen, 524; *Skrainka v. Rohan*, 18 Mo. App. 340; *Hollinsbee v. Ritchey*, 49 Ind. 261. In making the payment, or otherwise assuming to discharge the common obligation, a surety acts for himself alone, and at his own risk. If his payments are made under certain circumstances and conditions, a court of equity will require his cosurety to contribute his proportionate share of the amount of such payment. But, before the right of contribution arises, the cosureties are mere strangers, one to the other, and one has no right or authority to make contracts for another. Now, in this case, there was no breach of the bond, and no claim for damages thereunder was ever made by the insurance company. Had a claim matured on the bond in favor of the insurance company, and been paid by part of the sureties, they might, perhaps, compel contribution from the nonpaying sureties without the recovery of a judgment for breach of the bond, by making it appear that they had no means of preventing a judgment against them. But they could not voluntarily

borrow money for their principal, and bind a nonparticipating surety.

2. It is claimed, however, that the resolution of April 13 in some way changed or modified the rules ordinarily applicable to the relation of cosureties, and, in effect, made the sureties on the bond joint contractors or principals. But the object of this resolution is apparent. It was to place the signers of the bond in full control of all funds derived from the insurance company, and of the construction and erection of the building, so that they might protect themselves, as sureties on the bond, against liability for the acts of other persons. It did not in any way change their relation to the insurance company, or to one another as sureties. It only defined their rights and powers while acting as agents of the Chamber of Commerce. Their liability to the insurance company was fixed by the terms of the bond which they signed, and, as between themselves, by the law of suretyship. By the resolution they became agents of the Chamber of Commerce for the construction and erection of the building, and not of one another as sureties on the bond. Nor were they bound by such resolution, or the terms of the bond, to advance money for, or loan their individual credit to, the Chamber of Commerce, to enable it to perform its contract with the insurance company. It was not their duty, even under the resolution, to pay the material men and contractors for the building, or to provide funds for that purpose, but only to disburse and distribute the money received from the New York Life Insurance Co., and such other funds as their principal, the Chamber of Commerce, might provide for the erection of the building. Upon the fulfillment of the terms and conditions of the bond, their liabilities as sureties ceased; and as the appellant Hughes is not a party to any of the notes in controversy, except those to Green and Breck, and his

cosureties had no authority to bind him by the execution thereof, it seems necessarily to follow that he is not liable to contribute to the payment of such notes.

3. It is claimed that Hughes, by his letter of December 30, 1893, to the finance committee, ratified and confirmed the acts of his co-obligors on the bond to the insurance company in the construction of the building and borrowing money for that purpose. But, as they did not assume to act for him, or to bind him in any way, there was no contract or pretended contract on his part which he could ratify. The letter is an offer to bind himself on all contracts and obligations theretofore executed by the committee, and connected with the erection of the Chamber of Commerce Building, "by signing such contract or obligation as a party to and co-obligor therein," when he should return "in the spring or summer of 1894," upon certain conditions, which do not seem to have been fulfilled.

4. The letter can have no effect in determining his liability under the bond to the New York Life Insurance Co., and hence, as stated by counsel for plaintiffs, the real and only question in the case is, "Have the plaintiffs a right to claim contribution from the defendant as one of the signers of the bond to the New York Life Insurance Co. for moneys borrowed and used in the construction of the Chamber of Commerce Building?" And this question must, in our opinion, be answered in the negative. It is admitted that Mr. Hughes signed the Green and Breck notes. He claims, however, that he is a mere surety for the plaintiff Charles E. Ladd and the other makers. But, however this may be, this suit cannot be maintained, because the notes have not been paid by the plaintiff, and are now owned by one F. B. Pratt, who is not a party. It is elementary law that, except under

peculiar circumstances, a suit for contribution cannot be maintained by one of several joint obligors until payment of the joint obligation has been made, or something done equivalent thereto: *Backus v. Coyne*, 45 Mich. 584 (8 N. W. 694); *Shoemaker v. Stimson*, 16 Wash. 1 (47 Pac. 218); *Weidemeyer v. Landon*, 66 Mo. App. 520; *Huse v. Ames*, 104 Mo. 91 (15 S. W. 965). It follows that there is no ground for the interposition of a court of equity at the suit of the plaintiffs, so far as the Green and Breck notes are concerned. The decree of the court below must, therefore, be reversed, and the complaint, as to the appellant, Hughes, dismissed, and it is so ordered.

REVERSED.

Decided 15 August, 1900.

ON PETITION FOR REHEARING.

PER CURIAM. 5. The able and forcible petition for rehearing, as well as the importance of the case, has impelled us to re-examine the questions involved with the utmost care, notwithstanding which we are constrained to adhere to the former opinion. A surety may, in some instances, in a proper proceeding, without payment, compel his principal to pay, and the creditor to receive, the debt for which he has made himself liable: 7 Am. & Eng. Enc. Law (2 ed.), 345. But such remedy is not available here. The Chamber of Commerce is not a party to, nor is it liable to pay, the Green note; and, moreover, neither the owner nor holder of that or the Breck note is a party to the suit. So, also, one joint obligor may, under special circumstances,—as where the debt has been reduced to judgment, and the liability of the judgment debtors as between themselves is unascertained and undetermined, as in *Thompson v. Dekum*, 32 Or. 506 (52 Pac. 517, 755),—without having actually paid the debt, proceed in equity to ascertain the rights

of the parties, and compel a co-obligor to pay his portion of the common obligation. But this case presents no special features to take it out of the general rule. Indeed, on the whole, it is difficult to conceive what decree the court could make if it should entertain jurisdiction and find the defendant Hughes liable on the Green and Breck notes. It could not require the owner and holder of the notes to accept payment, because he is not a party to the suit; and, if he were, the court could not compel him to accept partial payment, or prevent him from enforcing collection from any of the joint makers, if he so chose; nor could we order Hughes to pay his portion of the debt to the plaintiff, for the plaintiff could not give him a discharge, nor has he yet paid more than his proportion of the obligation. So we are of the opinion that, on the record, the court ought not to entertain jurisdiction so far as the Green and Breck notes are concerned. The other matters are sufficiently considered in the former opinion. There is no difference in principle, so far as we can see, between Hughes' liability on the notes given directly to the contractors and those given for money borrowed to aid in the construction of the building. In either case his liability depends upon the interpretation of the bond given by the Chamber of Commerce to the New York Life Insurance Co., and we have sufficiently indicated our views upon that question. The petition for rehearing is therefore denied.

REHEARING DENIED.

Decided 17 September, 1900.

ON MOTION TO RECALL MANDATE.

PER CURIAM. The motion to recall the mandate is overruled. The statement in the opinion on the petition for rehearing that "the Chamber of Commerce is not a party to, nor is it liable to pay, the Green note," was in.

tended to refer to its liability upon the face of the note, and not to the rights, equitable or otherwise, of the makers thereof against it for indemnity or reimbursement. In *Wolmershausen v. Gullick*, 62 Law J. Ch. 773, unlike the case at bar, the principal creditor was proceeding against the plaintiff alone for the full amount of the debt, and had established his claim by judgment, or what was deemed equivalent thereto. But, whether such fact is material or not, we are unwilling to follow the doctrine of that case. The conclusion therein that the surety against whom the claim was established could, before actual payment, maintain a suit in equity against a co-surety, and obtain a prospective order directing the defendant, upon payment by the plaintiff of his own share, to indemnify him against further liability, is reached, as stated by the court, in the "absence of express authority," and is contrary to American adjudications, as we understand them.

MOTION OVERRULED.

Argued 12 February; decided 9 April, 1900.

CHAN SING v. PORTLAND.

[60 Pac. 718.]

WAIVER OF DEFECT IN COMPLAINT—AIDED BY VERDICT.

1. An objection that a complaint claiming damages for neglect does not allege a specific negligent act done or a duty negligently omitted is waived by answering and is cured by a verdict for plaintiff: *Booth v. Moody*, 30 Or. 222, applied; *Caspary v. Portland*, 19 Or. 496, distinguished.

NEGLIGENCE—OVERFLOWED SEWER—COMPETENT EVIDENCE.

2. In an action for damages arising from alleged negligence in failing to exercise due care in keeping the intake of a creek sewer open and free, evidence of the construction of a drift dam above such intake, and the accumulation of logs and debris above such dam, which, being relieved, floated down and obstructed the sewer, was competent on the question of the exercise of due care, after proof that the defendant had been warned of the danger.

DAMAGES—OPINION EVIDENCE.

3. Where a complaint charged an overflow caused by negligence in permitting the head of a creek sewer to become obstructed, evidence of witnesses, who did not see the overflow, that in their opinion it was caused by improperly guarding the

37	68
40	13m
40	563
40	565

37	68
41	298
37	68
45	109

head of the sewer, and not placing men enough there to keep it clear, was improperly admitted, since the question of what caused the overflow was the very thing the jury was called upon to determine, and was not a proper subject for opinion evidence: *Burton v. Severance*, 22 Or. 91, followed.

From Multnomah: ALFRED F. SEARS, JR., Judge.

This is an action by Chan Sing against the City of Portland to recover damages for an injury to plaintiff's property from an overflow of Tanner Creek caused by the alleged negligence of the defendant in not exercising due care and caution to keep open and free from obstruction the intake of Tanner Creek Sewer. Tanner Creek is a natural water course, with well-defined banks and channels. Some time prior to the injury complained of, the city diverted the water of the creek from its natural channel in and through a sewer known as "Tanner Creek Sewer." As an auxiliary thereto, it constructed a drift dam in the channel of the creek, some two or three hundred feet above the head of the sewer, to protect it from logs, drift, and debris. About 2 o'clock in the afternoon of November 16, 1896, the city authorities were notified that, owing to the storm then prevailing, the sewer was liable to become obstructed and cause an overflow of the creek. It thereupon put two men at work at the head of the sewer to keep it free from obstructions, which they succeeded in doing until about 7 or 8 o'clock in the evening, when logs and debris which had accumulated above the drift dam came down to the head of the sewer in a mass and stopped up the intake, thereby causing the waters of the creek to overflow its banks and inundate the plaintiff's garden; and this is the injury for which he seeks to recover damages. The complaint, after alleging the construction of the sewer by the city, avers "that on or about the sixteenth day of November, 1896, the said defendant, knowing that the said sewer was too small to carry off the water emptying into it from Tanner

Creek, and that in consequence thereof the said creek would overflow its banks, and that the said sewer would overflow, and that the said water would be precipitated onto the lands and property lying on the line of said sewer on said Jefferson Street, and would damage the said lands and property, and knowing that the said Tanner Creek carried in its stream wood, stones, rubbish, and debris which would close up the head of said sewer, and that the head of said sewer was not sufficiently maintained and protected by the said defendant so as to prevent the said head from being clogged and dammed up, and that when it became so clogged up the said water from said stream would be precipitated upon the lands and into the buildings along the line of said sewer, and would damage the same, the said defendant carelessly and negligently at said time failed and neglected to enlarge the said sewer and the head thereof, and carelessly and negligently permitted the head of said sewer to become clogged and dammed up, and carelessly and negligently failed to keep the head of said sewer open so as to receive and carry away the waters of said Tanner Creek which would empty into it, in consequence of which the said debris, logs, and rocks clogged and dammed up the head of said sewer, and the said waters were prevented from emptying into said sewer, and the said sewer overflowed, and the water from the said Tanner Creek was precipitated upon the vegetable gardens of the said plaintiff, and overflowed, washed away, and destroyed the beds of said garden," to his damage in the sum of \$498. The answer denies the negligence charged, and affirmatively alleges that the inundation and overflow were caused by an extraordinary and unusual storm, against the effects of which ordinary care and prudence could not guard. The trial resulted in a verdict and judgment in favor of

the plaintiff, and defendant appeals, assigning as error the ruling of the court in the admission and exclusion of testimony.

REVERSED.

For appellant there was a brief over the names of *Joel M. Long*, City Attorney, and *Ralph R. Duniway*, with an oral argument by *Mr. Duniway*.

For respondent there was a brief over the name of *Giltner & Sewall*, with an oral argument by *Messrs. Roscoe R. Giltner* and *Julius C. Moreland*.

MR. JUSTICE BEAN, after stating the facts, delivered the opinion of the court.

1. The defendant objected to the introduction of evidence at the trial on the ground that the complaint did not state facts sufficient to constitute a cause of action, which, being overruled, forms the basis of the first assignment of error. The argument is that the complaint is insufficient because it does not allege any specific negligent act done or duty omitted by an authorized agent of the city. While we do not understand that there is any different rule of pleading in actions of negligence against a municipality and against any other defendant, the objection here goes, in any event, to a mere defective statement of a cause of action, and was waived by answering over, and cured by the verdict: *Houghton v. Beck*, 9 Or. 325; *Gschwander v. Cort*, 19 Or. 513 (26 Pac. 621); *Booth v. Moody*, 30 Or. 222 (46 Pac. 884). The case of *Caspary v. City of Portland*, 19 Or. 496 (20 Am. St. Rep. 842, 24 Pac. 1036), upon which the defendant seems particularly to rely, is not in point, because: First, it was an action in trover to recover the value of certain goods alleged to have been wrongfully and unlawfully converted by the city; and, second, the objection was taken by demurrer in the court below, and

the cause came here on appeal from a judgment dismissing the complaint.

2. It is next claimed that the court permitted the plaintiff to prove and recover upon a ground of negligence not alleged. Upon the trial the plaintiff gave evidence, over the defendant's objection, concerning the construction of the drift dam and the accumulation of logs and debris above it, which, being released, floated down and obstructed the sewer. But he was not permitted to recover on account of the insufficiency of the drift dam, or of the negligence of the city in its construction or maintenance. The court pointed out to the jury the issues to be tried, and confined the recovery to the negligence charged. The evidence in reference to the drift dam was competent upon the question as to whether the city and its officers, after being warned of the danger, had exercised due and ordinary care, under the circumstances, to prevent the intake of the sewer from becoming obstructed.

3. The next assignment of error is based upon the admission of testimony of the witnesses Woodward and Haseltine. Woodward was called as a witness for the plaintiff, and, after testifying that he was familiar with Tanner Creek sewer, and knew of the overflow in question, was asked, "Do you know what was the cause of this overflow of the creek?" to which the defendant's counsel objected because the evidence was not competent, which objection was overruled, and the witness answered: "The overflow of the creek was caused from the head of the sewer being improperly guarded to take care of it, and debris washed down the creek and stopped up the head of the sewer, and sent this whole Tanner Creek coming down the street. This is a sore matter to me, too." The witness Haseltine was permitted, over defendant's objection and exception, to answer the fol-

lowing questions: "Q. From what you saw the next day, what, in your opinion, was the cause of the overflow at the head of Tanner Creek sewer? A. In the first place, there was a very large watershed, which brings down in a heavy storm a very large amount of water, and the entrance was not large enough to take care of all that amount of water unless it was kept clear of all the debris; and there should have been men there to keep that clear, in my opinion. Q. What is that? A. There should have been— There would have been no overflow, in my opinion, if they had been there, and kept the logs and debris away from it. Q. If the logs and debris had been kept away, in your opinion, the sewer would have been large enough to carry away the water? A. I do." This evidence was clearly incompetent, because the witnesses were permitted to give their opinion concerning the very matter in issue. The complaint charges that the defendant carelessly and negligently permitted the head of Tanner Creek sewer to become obstructed. The witness Woodward says that, in his opinion, the overflow was on account of the head of the sewer being improperly guarded. Haseltine says that it was because the city did not keep men enough there to keep it clear. In other words, both testify, in effect, that the city was negligent in not providing men enough to take care of the drift and debris coming down Tanner Creek, so as to prevent it from obstructing and damming up the sewer. This was the real question in issue in the case, and within the exclusive province of the jury to determine. It did not call for expert or opinion evidence, and it was improper to permit a witness to testify as to his opinion upon the question: *Burton v. Severance*, 22 Or. 91 (29 Pac. 200.) It follows that the judgment of the court below must be reversed, and a new trial ordered.

REVERSED.

Decided 18 April; rehearing denied 18 August, 1900.

SMITSON v. SOUTHERN PACIFIC COMPANY.

[60 Pac. 907.]

NEGLIGENCE OF RAILROAD—QUESTION FOR JURY—NONSUIT.

1. Plaintiff testified that, as she approached her destination at night, on defendant's train, the train stopped, and the brakeman said to her, "I will help you out with your things now;" that she followed him to the end of the car, where he held back the door while she passed out, and started down the steps; that the brakeman passed to the other side of the platform, and stood with his side towards her; and, after the car had stopped about fifteen seconds, the train suddenly started, throwing her beneath the car. Her testimony as to the train stopping about fifteen seconds before it reached the depot, and then suddenly starting, was corroborated by four witnesses. *Held*, that the evidence of the company's negligence was sufficient to take the case to the jury.

INJURY TO PASSENGER—TIME TO ALIGHT.

2. Where plaintiff testified that a train stopped fifteen seconds, and started suddenly before she had time to get off, the court cannot hold, as a matter of law, that she was negligent in not alighting in that time.

SUFFICIENCY OF EVIDENCE—CONTRADICTION BY PHYSICAL FACTS.

3. The testimony for both parties is reviewed and it is decided that the plaintiff's testimony was not sufficiently contradicted by physical facts to warrant the direction of a verdict for the defendant. If the established physical facts should conclusively show that the testimony of a witness could not be true, then it would probably be the duty of the court to reject such testimony, but such is not the case here.

CONTRIBUTORY NEGLIGENCE—COMPETENCY OF EVIDENCE.

4. Where plaintiff was injured by stepping from a train before it reached the depot, on a dark night, at a station where she had always lived, and was familiar with the surroundings, it was not error to allow the plaintiff to testify that the brakeman said he would help her to alight, from which she supposed the train was at the station when he spoke; otherwise, the jury might have inferred that she ought to have known where it was.

CROSS-EXAMINATION—FOUNDATION FOR IMPEACHMENT.

5. Where a witness, on cross-examination, made contradictory statements as to the position of the plaintiff when she fell from a train and was injured, questions as to statements made by him out of court, concerning how the accident occurred, inconsistent with his testimony in chief, were properly allowed to lay a foundation for impeachment.

DESIRED INSTRUCTIONS SHOULD BE REQUESTED.

6. If a particular instruction is desired on a given point it should be requested; counsel cannot sit by while the jury is being charged and then complain on appeal that something was omitted: *State v. Foot You*, 24 Or. 61, applied.

RAILROADS—TIME FOR PASSENGER TO ALIGHT.

7. An instruction that, when a passenger on a railway train arrived at his known destination, the law required the carrier to stop for a "sufficient" length of time to allow him to alight safely, was not prejudicial to defendant in not limiting the time to a "reasonable" length of time, where defendant claimed the train had not stopped when the injury occurred.

37	74
38	314
37	74
43	80
37	74
147	490

EVIDENCE JUSTIFYING INSTRUCTION.

8. An instruction that, if the train stopped before reaching the station, and plaintiff was led to believe from the words or acts of defendant's employee that it was a proper time for her to alight, and in attempting to do so she was thrown to the ground by the sudden jerk of the car or in any other manner and injured, defendant was guilty of negligence, was not erroneous, as not supported by the evidence, where the brakeman had testified that when the whistle sounded he went into the car where plaintiff was seated, and announced, "The next station is Springfield," which was plaintiff's destination.

ALLEGATIONS AND PROOFS—DUTY OF EMPLOYEE.

9. Under an allegation that plaintiff went out onto the steps of a railroad car which had stopped, intending to alight, but was thrown off by the sudden starting of the train, it is not objectionable to charge the jury that plaintiff could recover if the train was moving so slowly as to justify plaintiff in thinking it had stopped.

FUTURE MENTAL SUFFERING AS AN ELEMENT OF DAMAGES.

10. Where a person has sustained bodily injuries through the negligence of another the mental suffering that must necessarily be endured is an element of damages.

NECESSARY PHYSICAL SUFFERING AS AN ELEMENT OF DAMAGES.

11. Where plaintiff was injured by falling from the defendant's train, she is entitled to recover for the future bodily suffering occasioned by the loss of her limbs, such as the evidence shows it is reasonably certain she will be called on to endure.

COMPENSATION FOR INJURIES.

12. Where plaintiff, in falling from defendant's train, sustained an injury which necessitated the amputation of both her limbs, an instruction that, if the injury was caused through defendant's negligence, the jury should award her such sum as would compensate her for the injury, not to exceed the amount demanded, was not prejudicial to the defendant, though exact compensation may not be obtainable in such a case.

ENTIRE CHARGE MUST BE CONSIDERED.

13. All the instructions in a charge must be considered together, and if a given point is, on the whole, fairly presented, the case should not be reversed for inaccuracies in some paragraphs: *State v. Tarter*, 26 Or. 33; *Mallock v. Wheeler*, 29 Or. 64; *State v. Bartmess*, 33 Or. 110, applied.

INCONSISTENT INSTRUCTIONS.

14. Where the instructions given by the court of its own motion are correct expositions of the law applicable to the case, the fact that those given at the request of the defendant restrict those given by the court in some particulars, does not constitute reversible error, on the ground that the instructions are inharmonious, and it cannot be told which the jury followed in arriving at their verdict, where their finding for the plaintiff showed that they had followed those given by the court of its own motion, and also that they were not misled by the defendant's instructions.

INSTRUCTION USURPING PROVINCE OF JURY.

15. Under Hill's Ann. Laws, § 200, prohibiting the trial court from presenting the facts of a case to the jury, it was not error to instruct the jury that there was evidence for the plaintiff "to the effect" that the train came to a standstill, and that there was evidence "tending to show" that the accident occurred about 9 o'clock, as the court evidently did not attempt to state the facts to the jury, but merely called their attention to the theories of the respective parties: *Cross Bay R. R. Co. v. Siglin*, 34 Or 80, approved.

From Lane: J. C. FULLERTON, Judge.

This is an action by Jennie Smitson to recover damages from the Southern Pacific Co. for personal injuries. It is alleged in the complaint, in substance, that on July 29, 1897, plaintiff was a passenger on defendant's train from Coburg to Springfield, Oregon, and as the train approached the latter station, about 9 o'clock P. M., the signal whistle was given, the speed gradually slackened, and the train stopped about one hundred and twenty-five feet from the platform of the station; that, the night being dark, the brakeman invited plaintiff to alight, whereupon she rose, and, with his knowledge, followed him to the front platform of the car while the train remained stationary, and, believing that the train had reached the station, plaintiff, with the brakeman's knowledge, commenced to descend the car steps, without being notified that the train had not reached the station or warned that it was dangerous to alight, and while so descending the steps the train was suddenly started with a jerk, causing plaintiff to fall beneath the car, which ran over her legs, crushing them, and necessitating their amputation. The answer denies the charge of negligence, and alleges that plaintiff recklessly started out of the coach in which she was riding, to the front platform, and down the steps of the car, while the train was moving, and before it reached the station, and sustained the injury of which she complains in consequence of her own carelessness. The allegations of new matter in the answer having been denied in the reply, a trial was had, resulting in a judgment for plaintiff in the sum of \$10,000, and defendant appeals.

AFFIRMED.

For appellant there was a brief over the names of *Fenton*, *Bronaugh & Muir*, and *E. R. Skipworth*, with an oral argument by *Mr. William D. Fenton*.

For respondent there was a brief over the names of *Thompson & Hardy*, and *H. D. Norton*, with an oral argument by *Messrs. H. W. Thompson* and *A. C. Woodcock*.

MR. JUSTICE MOORE, after stating the facts, delivered the opinion of the court.

1. At the trial, plaintiff having offered her testimony and rested, defendant's counsel moved the court for a judgment of nonsuit, on the ground that she had failed to show any negligence on defendant's part, but, the motion being overruled, an exception was saved. The rule is well settled in this state that a motion for a judgment of nonsuit is in the nature of a demurrer to the evidence, in the disposal of which all the testimony produced by plaintiff is to be regarded as true, together with every intendment and reasonable inference which can arise thereon, and, when so considered, if a difference of opinion may exist as to the conclusions of fact deducible therefrom, the issue should be submitted to the jury for their determination; it being sufficient if the evidence offered tends to support the action, even though remotely: *Tip-pin v. Ward*, 5 Or. 450; *Herbert v. Dufur*, 23 Or. 462 (32 Pac. 302); *Barr v. Rader*, 33 Or. 375 (54 Pac. 210). The plaintiff testified, in her own behalf, that her age was twenty-one years, twenty of which had been spent in Springfield; and, speaking of the injury, she said that as the train approached her destination, at about 9 o'clock in the evening, the whistle was sounded, and the train stopped; whereupon the brakeman, coming into the car, of which she was the only occupant, said to her, "I will help you out with your things now;" that she rose from her seat, took a valise and a package in her right hand, and a package and a hat in her left hand, and followed the brakeman, who opened the door and held it back while she passed to the front platform; that the brakeman

crossed over the coupling to the baggage car, and while he was standing with his side towards her, and looking towards the engine, she asked him to take her valise, but, not receiving any reply to her request, she started down the steps, after the car had remained stationary about fifteen seconds, and, as she reached the third step, the train was suddenly started with a jerk, throwing her upon the rail, and the car passed over her legs, crushing them, and necessitating the amputation of the right about five inches above, and the left just below, the knee. Etta Smitson, plaintiff's sister, testified that she was at the station when the train arrived on the evening in question; that the night was very dark, and the station lamp unlit; that, standing in the door of the waiting room, she heard the signal whistle given, whereupon she went upon the depot platform towards the incoming train, which stopped about fifty feet from the station; that the train, after remaining stationary about ten or fifteen seconds, was started up with a jerk, and came to the depot. Minnie McPherson corroborates the preceding witness, and says the engine stopped so that the cowcatcher was about fifteen feet from where she was standing on the depot platform with Etta Smitson, and that the train, having remained stationary about ten seconds, moved up to the depot. Henry Smitson, plaintiff's father, testified that the engine stopped about fifteen or twenty feet from where he was standing on the platform west of the depot, and that the train, after remaining stationary about twelve or fifteen seconds, was started up with a jerk. H. Carter, plaintiff's witness, testified that he was at Springfield when plaintiff was injured; that the train came in that evening very slowly, and stopped about five seconds, when it pulled up quickly, the smoke coming in puffs from the engine.

The foregoing is the substance of the testimony pro-

duced by plaintiff relative to the cause of the injury, at the time the motion for a judgment of nonsuit was interposed, and such testimony having tended to prove the allegations of the complaint, does the evidence establish a cause of action sufficient to be submitted to the jury? In *Central Ry. Co. v. Van Horn*, 38 N. J. Law, 133, the declaration averred that a conductor in the night time, announced, in a car in which plaintiff was riding, the name of the station at which she intended to leave the train, which stopped before reaching it, and plaintiff, supposing that she had arrived at her destination, attempted to alight, when the train was suddenly put in motion, throwing her to the ground, in consequence of which she was injured, and it was held that the pleading was sufficient, Mr. Chief Justice BEASLEY saying: "The negligence here complained of was the giving of the false intelligence that the cars had arrived at the station, and by that means inducing plaintiff to go upon the car platform and endeavor to alight. The court would not be warranted in saying that it is not negligence to give notice of the approach to a station, and then to stop the train short of such station in the nighttime. Such a course would naturally tend to jeopard passengers; for it would induce them to believe that they had arrived at the station designated, and they would, in the ordinary course, go to the car platform. At night, this must be the inevitable result. It is said in the brief of the counsel of the defendant, that it was right to give the notice at a long distance from the depot, so that the passengers might prepare to leave the cars. This may do when the train is not to stop before it reaches the station. When a station is called the passengers have a right to infer that the first stop of the train will be at such station." To the same effect, see *Hutchinson, Carr.* § 615; *Memphis, etc. Ry. Co. v. Stringfellow*, 44 Ark. 322 (51 Am. Rep.

598); *Taber v. Delaware, etc. R. R. Co.* 71 N. Y. 489; *McDonald v. Illinois, etc. R. R. Co.* 88 Iowa, 345 (55 N. W. 102); *Boss v. Providence, etc. Ry. Co.* 15 R. I. 149 (1 Atl. 9); *McDonald v. Long Island Ry. Co.* 116 N. Y. 546 (15 Am. St. Rep. 437, 22 N. E. 1068); *Columbus, etc. R. R. Co. v. Farrell*, 31 Ind. 408; *McGee v. Missouri, etc. Ry. Co.* 92 Mo. 208 (1 Am. St. Rep. 208, 4 S. W. 739); *Smith v. Georgia Pac. R. R. Co.* 88 Ala. 538 (16 Am. St. Rep. 63, 41 Am. & Eng. R. R. Cas. 143, 7 South. 119, 7 L. R. A. 323); *Chicago, etc. R. R. Co. v. Arnol*, 144 Ill. 261 (33 N. E. 204, 19 L. R. A. 313); *Devine v. Chicago, etc. R. R. Co.* 100 Iowa, 692 (69 N. W. 1042); *Ward v. Chicago, etc. R. R. Co.* 165 Ill. 462 (46 N. E. 365); *Lent v. New York, etc. R. R. Co.* 120 N. Y. 467 (24 N. E. 653). A passenger having reached his destination is entitled to reasonable time and opportunity to leave the conveyance that has transported him, and if such vehicle is started suddenly while he is in the act of alighting, and he sustains injury thereby, the carrier is responsible for the negligence which produced the hurt: *Hutchinson, Carr.* § 612; 2 Wood, R. R. § 305; *Pennsylvania Ry. Co. v. Kilgore*, 32 Pa. St. 292 (72 Am. Dec. 787); *Chollette v. Omaha, etc. R. R. Co.* 26 Neb. 159 (41 N. W. 1106, 4 L. R. A. 135).

2. Under these rules if the testimony produced by plaintiff was to be believed, the jury might have found that the train stopped before it reached the station; that plaintiff was invited to leave the car, which was then stationary; that she did not know that the train had not reached the depot platform; and that while she was in the act of alighting the train was suddenly started, in consequence of which she was injured. Whether fifteen seconds was a reasonable time in which to leave the car was a question for the jury, or, at least, her departure was not so unreasonably delayed that a court could say,

as a matter of law, that she was negligent in this respect, and hence no error was committed in refusing to grant the judgment of nonsuit.

3. When the cause was finally submitted, defendant's counsel renewed said motion, contending that the physical facts demonstrated by the nature of plaintiff's injury, the character of the train, the distance it is said to have moved after it is claimed to have been stopped, the destruction by plaintiff's counsel of a statement prepared by his client respecting the cause and manner of the injury, her admissions in relation thereto, and subsequent contradictory statements, the testimony of the witnesses who saw the train, and testified that it made no halt till it reached the station, showed beyond a reasonable doubt that the train did not stop as claimed; but, the motion being overruled, it is insisted that the court erred in this respect. There may be certain physical facts, the proof of the existence of which must necessarily overcome, as a matter of law, all testimony to the contrary. The present is not an age of miracles, and, if testimony be introduced at a trial which transcends the ordinary laws of the universe, the court, being obliged to take judicial notice of such laws, would probably be compelled to reject such testimony.* Assuming that such rule is applicable, we will examine the physical facts in evidence, to ascertain if they contradict the testimony produced by plaintiff respecting the manner of her injury, and show that the car had not stopped, but was in motion, when she attempted to leave it. The most cogent fact of this character is that the car wheels, in passing along

*NOTE.—The sections of Hill's Ann. Laws, here referred to, read as follows:
Section 707. "There are certain facts of such general notoriety that they are assumed to be already known to the court."

Section 708. "The following facts are assumed to be thus known:— * * *
8. The laws of nature," etc.

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the track, ran over and crushed plaintiff's legs, while she was otherwise uninjured. This fact, however, does not conclusively show whether the car had been in constant motion, or was suddenly started with a jerk from a state of rest at the time the injury occurred: *Denver Tramway Co. v. Owens*, 20 Colo. 107 (36 Pac. 848.) The right leg having been crushed above, and the left below, the knee, shows that plaintiff was lying obliquely across the track at the instant the car passed over her limbs. The evidence shows that she attempted to alight from the left side of the car, and as her hands were occupied with her valise and parcels, so that she could secure no support from the railing, her face must have been turned towards the direction in which she was going, and, her limbs having been crushed in the manner indicated, her body must have been completely turned, so that her face was towards the car at the time she was injured. If the train was in motion when plaintiff descended the steps, her body would necessarily have attained the same momentum which the car possessed, and the inertia would not be so great as if the car were suddenly started from a state of rest. The accelerated motion thus occasioned by the sudden starting would be communicated to plaintiff's feet by reason of her position on the step, and the greatest inertia would result to her head and body, causing them to strike the corner of the car in such a manner as to turn her face towards the track, in the condition in which she was found, from which it might be reasonably inferred that the physical fact corroborated plaintiff's testimony.

Another physical fact which it is urged contradicts plaintiff's testimony, that a stop was made just before the station was reached, is the character of the train then being operated. This train, so the evidence shows, consisted of a locomotive and its tender, a baggage car

partly occupied for the transportation of mail, and a passenger coach, in which plaintiff rode. It is undoubtedly true that the length and weight of the train are factors which necessarily conduce to steadiness of motion, and it is equally true that a heavy train cannot be started from a position of rest with the same celerity as that attained by an engine propelling a lighter train. The train being light, its motion would probably be variable, in which case plaintiff would be more apt to be conscious of its motion than if it were heavier. So, too, the sudden start of the train in question would tend to produce the effect claimed by plaintiff. The jury might, therefore, reasonably infer, from a consideration of the physical fact of the size and weight of the train, that it corroborated the testimony produced by plaintiff respecting the stop claimed to have been made before the station was reached.

The last physical fact which it is claimed contradicts such testimony is the distance it is said the train passed over after the alleged halt before it finally stopped. The testimony produced by defendant shows that a stake was set indicating the point on the track where the injury occurred, which is one hundred and thirty and one-half feet west of the depot platform, and that the brakeman, having seen plaintiff fall, signaled the engineer, who stopped the train so that the front end of the passenger coach was about ten feet from the west end of said platform; thus showing that the train passed over one hundred and twenty feet of the track after the injury occurred, before it was stopped. No expert testimony was introduced showing what time was required to stop a train of the character in question, and moving with a velocity of about four miles per hour, as claimed by defendant's witnesses, and hence it is impossible to say that this fact is a factor in the case. The train being light, and moving

with the speed claimed, its momentum could not have been very great, and that it could have been easily stopped must be conceded. The fireman testified that he saw the signal, and informed the engineer, who stopped the train ; but whether the signal was seen when first given does not appear, and, in the absence of such evidence, we think it cannot be said that the physical fact of the distance passed over by the train after the accident contradicts plaintiff's testimony that the train was stopped and again started. All of defendant's employees who saw the train as it approached the station, or were engaged in operating the train, say that it made no stop until after the injury occurred. Their testimony in this respect was corroborated by that of V. H. Read, a railway postal clerk, who was occupied in the performance of his duties in the baggage car, and W. F. Hunnicutt, a mail messenger at Springfield, who observed the approaching train. Evidence was introduced tending to show that plaintiff, at the time she was injured, said, in response to the inquiry as to how it occurred, " I thought the train had stopped." Evidence was also introduced tending to show that plaintiff and her witnesses had made contradictory statements respecting the stopping of the train before it reached the station, and as to one of them testimony was offered tending to impugn his veracity. Plaintiff's counsel admitted, at the trial, that he purposely destroyed a written statement made by his client soon after the injury, giving her version of the occurrence. The testimony of the fireman on the engine tended to show that before the injury occurred the steam was shut off, and that the train was "drifting in ;" that thereafter he thought the air was slightly applied before a switch was passed ; and that, if a miscalculation were made when shutting off steam as to the momentum required to propel the train to the station, the train was generally allowed to stop. A. R. Brabham,

a witness called by defendant, says that the train was running very slow over the switch, and thereafter seemed to be running faster at the point where the injury occurred. G. W. Brabham, appearing as a witness for defendant, testified that he was not in a position where he could see the train all the time, so as to be able to observe whether it stopped before reaching the station, but he says he saw a lantern carried by a person on the train moving up and down. The evidence shows that such a motion is a signal to the engineer to go ahead.

The substance of the testimony produced by the defendant has been stated somewhat in detail, not for the purpose of commenting upon its weight or the credibility of the persons who gave it,—for that is not within the purview of our authority, under the practice prevailing in this state,—but to show that the jury from this testimony might reasonably have inferred that, after the steam was shut off and the train was “drifting in” to the station, the speed was checked by the air being slightly applied before passing the switch ; that the train came to a halt, as was likely to occur when a miscalculation was made in shutting off the steam ; that the brakeman, after opening the car door for plaintiff to pass out, having discovered that the train had not quite reached the proper place for passengers to alight, gave the “up and down” signal with his lantern, whereupon the train was suddenly started, causing the injury complained of, thereby showing that such testimony corroborated that given by plaintiff’s witnesses.

At the trial plaintiff’s counsel admitted that he destroyed a written statement respecting the manner in which his client was hurt, made by her at a time when it was supposed by her friends that she would die from the effects of the injury. The statute declares that the willful suppression of evidence creates a disputable pre-

sumption that such evidence, if produced, would be adverse to the party suppressing it: Hill's Ann. Laws, § 776; subd. 5. Such statement, however, was inadmissible in evidence, except to contradict plaintiff's testimony, which could have been accomplished by proving its contents, but, as no effort was made to do so, the jury might well infer that the statement could not have been very important, even for that purpose. The witness Minnie McPherson signed a written statement, prepared by defendant's agents, which contradicts the testimony given by her on the trial. She testified, however, that the persons preparing such statement did not write it as she suggested. G. W. Brabham, defendant's witness, signed a similar statement, prepared by the same persons, and he also says that the statement was not written as he directed. The physical facts are not such, in our judgment, as to take the case from the jury, who were the judges of the weight and credibility of the testimony, including the contradictory statement, and no error was committed in ultimately overruling the motion for a judgment of nonsuit.

4. The court, over defendant's objection and exception, permitted the following question to be propounded to the plaintiff: "Where did you suppose the train was when you got up to leave your seat in the car?" to which she replied: "I supposed the train was at the Springfield depot; the brakeman inviting me out made me think I was getting off at the proper place." It is argued that negligence should not be imputed to defendant, or its liability made to depend, upon plaintiff's belief. Plaintiff having lived in Springfield, a small country town, the greater part of her life, the jury might have reasonably inferred that she was acquainted with the depot and its immediate surroundings, in which case a greater degree of care was necessary on her part than if

she had been a stranger in the place. To rebut such inference, the question and answer were proper, especially so when it is considered that the night was quite dark, and that plaintiff's witnesses had testified that the station lamp was not lit.

5. Ed Mills, the brakeman on the train at the time plaintiff was injured, appearing as defendant's witness, testified in chief that he was standing on the platform of the car, and saw her fall; whereupon the following questions were asked and answers given, over defendant's objection and exception: "Were you present at Coburg the next morning, when the train made the stop at the station on the trip north, and at that time and place did you not have a conversation with Wilber Vaughn and Arthur Holland, in which you told them that Jennie Smitson walked out on the platform, and down the steps, and stepped off the lower step, and fell, and rolled under the wheels of the car, or words to that effect? A. I don't remember having a conversation with them at all. Vaughn asked me how it happened, and I told him I didn't know how it happened. There were several asked me how it happened, and I told them I didn't know. Q. You mean to be understood as swearing that you did not, in the presence of those parties, make the statement that I have related, or any of those words, or words to that effect? A. No, sir. Q. Did you not in the evening of that day have a conversation with the same parties, Wilber Vaughn and Arthur Holland, at the station when the train stopped on the trip south, in which you told them that Jennie Smitson fell from the platform, or one of the top upper steps, and that you tried to catch her, but just missed her cape, and that she fell lengthwise of the train, and in attempting to get up threw her legs across the track, and got them run over, and that you saw the whole thing, or words to

that effect, and in the presence of other persons unknown at Coburg? A. Well, I believe there was said a few words. I did talk a little. There was nothing said about my seeing it all, or catching her,—nothing of that kind at all. There was quite a little work to do while we were at Coburg. There was a large crowd around there that evening. I said nothing about catching or seeing her.”

It is insisted that Mills had given no testimony inconsistent with the alleged narration of the manner of the injury, that the statements imputed to him were not relevant to the issue, and that the court erred in permitting a foundation to be laid to impeach an important witness in an immaterial matter. The credit of a witness may be impeached by proof that he has made statements out of court, concerning matters relevant to the issue, inconsistent with his testimony given at the trial; but, before this can be done, it is necessary, in cases of verbal statements, first to call his attention to the time, place and persons present, so as to give him an opportunity to refresh his memory, and when this has been done he may be asked if he made the statement imputed to him: Hill's Ann. Laws, § 841; *State v. McDonald*, 8 Or. 113; *Sheppard v. Yocum*, 10 Or. 402; *State v. Hunsaker*, 16 Or. 497 (19 Pac. 605); *State v. Ellsworth*, 30 Or. 145 (47 Pac. 199); *State v. Welch*, 33 Or. 33 (54 Pac. 213); *State v. Bartmess*, 33 Or. 110 (54 Pac. 167). Mills said in his cross-examination that when standing on the car platform he felt something touch his arm, and, turning, he caught a glimpse of plaintiff's dress, and saw her light on her head and shoulders, her feet being up. Upon further cross-examination, he said he did not see her feet or know where they were. The witness having made contradictory statements respecting the position of plaintiff's feet when she fell, the limit of

his cross-examination, as to her situation on the ground, was within the discretion of the trial court, for the purpose of testing his veracity and the accuracy of his memory (*Neal v. Neal*, 58 Cal. 287); and as the narrative of the injury, so imputed to him, related to the manner in which the accident occurred, his testimony in relation thereto was material, and no error was committed in permitting a foundation to be laid for impeaching testimony.

6. It is maintained, however, that such statement out of court was a narrative of a past occurrence, and, not being a part of the *res gestæ*, it was the duty of the court to instruct the jury that Mills' alleged declarations were not admissible, except for the purpose of contradicting him. The rule is well settled that alleged declarations of a witness made out of court, which are inconsistent with the testimony given by him at the trial, are inadmissible as substantive evidence: *State v. Fitzhugh*, 2 Or. 227; *Langford v. Jones*, 18 Or. 307 (22 Pac. 1064); *State v. Jarvis*, 18 Or. 360 (23 Pac. 251); *State v. Steeves*, 29 Or. 85 (43 Pac. 947). In *Joseph v. Furnish*, 27 Or. 260 (41 Pac. 424), it was held that the jury should have been instructed that evidence of contradictory statements should only be considered for the purpose of impeaching the credibility of the witness to whom such statements were imputed. It does not appear that any request was made in that case to instruct the jury as indicated, and, while it is true that a trial court should state to the jury the law applicable to the facts involved, no error can well be predicated upon the court's failure in that respect, in the absence of a request for such instruction: *Page v. Finley*, 8 Or. 45; *Kearney v. Snodgrass*, 12 Or. 311 (7 Pac. 309); *State v. Foot You*, 24 Or. 61 (32 Pac. 1031, 33 Pac. 537). No request was made therefor in this case, notwithstanding which the court told the jury that testimony had been admitted tending to show that some of the witnesses had

made statements out of court which it was claimed contradicted their testimony given at the trial, and that it was their duty to take into consideration such contradictory statements in determining the value and weight of the testimony of such witnesses.

7. The court charged the jury, in effect, that, when a passenger on a railway train arrived at his known destination, the law required the carrier to halt at the usual stopping place for a sufficient length of time to enable him safely to alight. An exception to this portion of the charge having been taken, it is insisted that the court erred in not limiting such time. A passenger, having arrived at his destination, is entitled to a reasonable time in which to alight, and such time is to be measured by the number of passengers who are obliged to leave at that point, their age, sex and physical condition, the nature of the landing place, and the quantity of light shed thereon : *Keller v. Sioux City, etc. R. R. Co.* 27 Minn. 178 (6 N. W. 486). The defendant's theory is that the train had not come to a halt when the injury occurred, and, as far as defendant is concerned, the time allowed for alighting prior to reaching the station was immaterial. The greatest estimate of the length of the stop made by the train before reaching the station, as testified to by plaintiff's witnesses, is fifteen seconds, and, the time being so short, we cannot think the defendant was prejudiced by the omission of the word "reasonable" as qualifying the word "sufficient" used in the instruction.

The court instructed the jury to the effect that if they found that the train stopped before reaching the station, and that plaintiff was led to believe from the words or acts of defendant's employee that it was the proper time for her to alight, and that relying thereon she went upon the platform and down the steps while the car was stationary, and was thrown to the ground by the sudden

start or jerk of the car, or in any other manner, and injured, the defendant was guilty of negligence. An exception having been reserved to this portion of the charge, it is insisted that plaintiff was permitted to recover upon proof of defendant's failure to warn her that the train was moving, and that it was dangerous for her to alight; that this instruction places plaintiff's reliance upon the fact that the train had reached the depot, and not upon her belief that the car had stopped. The court told the jury that, if plaintiff was thrown to the ground "in any other manner," the defendant was liable. This phrase was undoubtedly used as a synonym for a sudden start or jerk of the car, and, while superfluous, we do not think it was prejudicial.

8. It is maintained that no testimony was introduced that justifies an instruction respecting any reliance upon the acts or words of the brakeman which would induce plaintiff's belief that the train had reached the station. The brakeman testified that, as the train approached the depot, the signal whistle was sounded, and he went into the car in which plaintiff was riding, and said, "the next station is Springfield." If, after such announcement the car was stopped before reaching the station, and plaintiff, by reason of the darkness, was unable to perceive that the train had not arrived at the point where she was to depart, it was for the jury to say whether the announcement and stop were sufficient to raise a belief in her mind as to the existence of such fact: *Central R. R. Co. v. Van Horn*, 38 N. J. Law, 133; *Brooks v. Boston & Maine R. R. Co.* 135 Mass. 21; *Merritt v. New York, etc. R. R. Co.* 162 Mass. 326 (38 N. E. 447).

9. The court instructed the jury to the effect that if they found the train had stopped before reaching the station, or was moving so slowly as to lead plaintiff, as a prudent person, to believe that it had reached the depot

and was stationary, and that, acting upon such belief, she left the car, and descended the steps, and the brakeman saw her do so without informing her that the train had not reached the station, or that it was dangerous for her to alight, the defendant was guilty of negligence. An exception having been taken to this portion of the charge, it is contended that plaintiff was thereby erroneously permitted to recover upon an alleged ground of negligence not stated in the complaint. The complaint avers that the train stopped before reaching the station, and was negligently started with a jerk, without allowing plaintiff a reasonable time to alight; and this presents the question whether, under such an allegation, plaintiff can recover, if the train was slowly moving at the time she descended the car steps, though she believed the train was stationary: In *Bartholomew v. New York, etc. R. R. Co.* 102 N. Y. 716 (7 N. E. 623), the plaintiff, a passenger on defendant's train as it approached a station in the night time, was informed by the conductor that she must change cars at the first place at which the train would stop; that "Rochester" would be called, and she must take the second right-hand train. Thereafter the brakeman announced, "Rochester; change cars;" and, the train having either stopped or slowed down so that to plaintiff, in the car, it appeared to have stopped, she went upon the platform, and by a sudden jerk of the train was injured, and, having secured a judgment for the damage sustained, the defendant appealed, assigning as error the following sentence in the judge's charge: "If the train appeared to have stopped, then, for all practical purposes and for the consideration of this case, it had stopped." This language was explained by the following: "If from the evidence you shall say that, when this woman stepped out upon the platform, the train had stopped, or appeared to persons of ordinary intelligence and observation to have

stopped, following, as it did, the conceded announcement, the fact that an announcement had been made that the station had been approached, and by a sudden jerk, of which she had no warning, she was precipitated and received this injury, she has a right of action." Mr. Justice EARLE, speaking of the plaintiff, in deciding the case, says: "She was bound to act upon appearances, and, after making the announcement, if the train was run so slow as to appear to a person of ordinary intelligence and observation to have stopped, ordinary care for the safety of the passengers required the train to be so run and managed as not to endanger their lives, and a sudden jerk or start, without any warning, when the passengers were upon their feet, moving towards the platform of the cars, was sufficient evidence of carelessness to impose liability upon the defendant. As to any one in the cars when the train appeared to have stopped, it was the same as if it had stopped, and the same duty rested upon the defendant to care for the safety of the passengers."

In *Mearns v. Central, etc. R. R. Co.* 48 N. Y. Supp. 366, a conductor on defendant's train having announced, in the nighttime, "All out; Jersey City; last stop,"—plaintiff, a passenger in one of its cars, rose, walked to the platform, and, the vestibule door being opened, he, supposing the train to be stationary, attempted to alight in the conductor's presence, and was thrown down and run over, and, having brought an action for the injury sustained, a judgment of nonsuit was given, in reversing which Mr. Justice BARRETT says: "The conductor knew, or should have known, that the car was in motion at the time he invited plaintiff to alight. There was evidence that the conductor was facing the plaintiff, and saw that the latter was acting upon his invitation. If it was dangerous for the plaintiff to do what he was thus invited to do, it was the conductor's clear duty to check him, or,

at least, inform him of the danger. The jury might well have found upon the evidence that the conductor neglected his duty. At all events, the question was for them." As to injuries received by passengers in consequence of acting upon announcements made or in obeying instructions or commands given by railway employees, see *Mensing v. Michigan Cent. R. R. Co.* 117 Mich. 606 (76 N. W. 98); *Lent v. New York Cent. R. R. Co.* 120 N. Y. 467 (24 N. E. 653); *Lewis v. President of Del. Canal Co.* 145 N. Y. 508 (40 N. E. 248); *Kentucky & Ind. Bridge Co. v. Quinkert*, 2 Ind. App. 244 (28 N. E. 338).

Plaintiff testified, in effect, that the brakeman held the door back with his hand while she passed out of the car to the platform, and, if the jury believed her, they might reasonably have found that the brakeman knew she accepted his invitation, and intended to alight at that time, and, the night being dark, it was for the jury to say whether plaintiff could have discovered that the train was moving. It was the duty of the brakeman to know whether the car was stationary, and, knowing that plaintiff intended to alight, it was his duty to warn her of the danger to be apprehended. The negligence charged consisted not only in starting a stopped train with a jerk before she was allowed a reasonable time to leave the car, but in the brakeman's permitting her, in pursuance of his invitation and with his knowledge that she intended to alight at that time, to follow him to a place which he knew or ought to have known was dangerous, and permitting her to attempt to leave the train without warning her of the danger. The complaint having stated that plaintiff left the car and descended the steps with the knowledge of the brakeman, who failed to warn her of the danger, and testimony having been introduced from which the jury might have found such fact, and that the

plaintiff believed the car was stationary, it was, as to her, stationary, and no error was committed in giving the instruction complained of.

10. The court instructed the jury to the effect that, if they found plaintiff was injured in consequence of defendant's negligence, they might consider as an element of damages the bodily pain and suffering which she had endured, or might thereafter suffer, and the bodily and mental suffering to which she will be subjected, on account of the deformity occasioned by the loss of her limbs, and, having considered those and other elements of damage, it was the duty of the jury to determine such sum as in their judgment would compensate plaintiff for the injury received, not exceeding the amount demanded. An exception having been taken to this portion of the charge, it is contended that the plaintiff's mental suffering occasioned by the loss of her limbs is not an element of damage; that the instruction did not limit her future bodily suffering to such as the evidence reasonably showed she would be compelled necessarily and inevitably to endure; and that the jury were erroneously told that it was their duty absolutely to compensate plaintiff for her injury. In *Kendall v. City of Albia*, 73 Iowa, 241 (34 N. W. 833), it was held that an instruction authorizing the jury to award damages for future mental suffering was not erroneous. In *Heddles v. Chicago, etc. Ry. Co.* 77 Wis. 228 (20 Am. St. Rep. 106, 46 N. W. 115), plaintiff, having had his legs crushed, necessitating amputation, by being run over by defendant's cars, brought an action for the injury, and at the trial the court instructed the jury that they might consider, as an element of damage, the mortification and anguish of mind which plaintiff would suffer in the future by reason of the mutilation of his body, and it was held, in affirming the judgment, that no error was committed in giving the instruction. The

weight of judicial authority supports the rule that, where a person has sustained a bodily injury in consequence of the negligence of a party, the future mental suffering necessarily to be endured constitutes an element of damages: 8 Am. & Eng. Enc. Law (2 ed.), 660 and notes; Hutchinson, Carr. (2 ed.) § 806; *Sherwood v. Chicago, etc. Ry. Co.* 82 Mich. 374 (46 N. W. 773); *Miller v. Boone County*, 95 Iowa, 5 (63 N. W. 352).

11. The instruction complained of does not limit the jury in express terms to a consideration of plaintiff's future bodily suffering which the evidence shows it is reasonably certain she will be compelled to endure as a result of the injury, but, by a consideration of the other portions of the charge, such limitation is fairly inferable therefrom.

12. It has been said that scarcely any sum would compensate a laboring man for the loss of his limb, and that, where such loss is occasioned by the negligence of a party, relative compensation only can be awarded: *Ashworth v. Southeastern Ry. Co.* L. R. 18 Q. B. 104; *Western, etc. R. R. Co. v. Young*, 83 Ga. 512 (42 Am. & Eng. Ry. Cas. 135, 10 S. E. 197). In actions for an injury not willfully inflicted, compensation is the fundamental principle of the law of damages (8 Am. & Eng. Enc. Law [2 ed.], 544, 546); and, while absolute compensation for injury resulting from the loss of a limb is not attainable, we do not think the instruction complained of was prejudicial: *Illinois Cent. Ry. Co. v. Cole*, 165 Ill. 334 (46 N. E. 275); *Atherton v. Village of Bancroft*, 114 Mich. 241 (72 N. W. 208); *Louisville, etc. Ry. Co. v. Falvey*, 104 Ind. 409 (3 N. E. 389); *Cleveland, etc. Ry. Co. v. Newell*, 104 Ind. 264 (3 N. E. 836, 54 Am. Rep. 312.)

13. The court, having instructed the jury that the burden of proof was upon the plaintiff, said to them: "By the burden of proof is meant that she must make

out the better case." An exception having been taken to this portion of the charge, it is contended that plaintiff's right of recovery did not depend upon her making out the "better case," but upon proof of defendant's negligence in some of the particulars specified in the complaint. The charge of the court, when construed in its entirety, as it should be, we do not think objectionable as claimed: *State v. Anderson*, 10 Or. 448; *Wellman v. Oregon Short Line Ry. Co.* 21 Or. 530 (28 Pac. 625); *State v. Tarter*, 26 Or. 38 (37 Pac. 53); *Matlock v. Wheeler*, 29 Or. 64 (40 Pac. 5, and 43 Pac. 867); *State v. Bartmess*, 33 Or. 110 (54 Pac. 167).

It is contended that instructions numbered 10, 11 and 13, given by the court, are directly in conflict with instructions numbered 17, 18 and 22, given at defendant's request. These instructions are as follows:

"(10) When a person purchases a ticket of a railroad company, and enters its cars for the purpose of being conveyed from one point to another, the law raises an obligation on the part of the railroad company to carry the passenger safely to the point to which the ticket was purchased, and to stop its train at the point to which the ticket was purchased, at the station of the company or usual place of stoppage, for a sufficient length of time to enable the passenger to safely alight from the train.

"(11) If, after a careful examination of all the evidence in this case, you are satisfied, by a preponderance thereof, that at the time the plaintiff was injured she was led to believe, by the words and acts of the defendant's employee, and had reasonable grounds to believe, that the train had arrived at the station at which she wished to alight, and you find that the train had stopped and was standing at the time she passed from the platform of the car to the steps of the car, and after she had

reached the steps of the car, and while there, she was thrown to the ground by the sudden start or jerk of the car, or in any other manner, and injured in the manner detailed to you by the witnesses, then you will be justified in finding that the injury occurred through the neglect or want of care of the defendant company, and the plaintiff is entitled to a verdict at your hands."

"(13) Or, if you should find from the evidence introduced in this case that the plaintiff left the car in which she was riding under the belief that the train had stopped, and went upon the platform of the car with her hand baggage, and attempted to alight, under the belief that she had reached the station, and at that time the train had stopped, or was moving so slowly as to lead the plaintiff, as a reasonably prudent person, to believe it was stationary, and was at the station of the defendant at Springfield, and you also find that the brakeman, the employee of the defendant, saw the plaintiff leave the car, and descend the steps to the platform, and he did not warn or inform her that the train had not yet reached the station, or that it was dangerous to alight at the point at which she was attempting to alight, then the defendant was guilty of negligence, and the plaintiff is entitled to a verdict at your hands."

"(17) If you find from the evidence that shortly before the accident, and as defendant's train in question was approaching the station at Springfield, the servants or servant of defendant announced the station of plaintiff in the car, and the whistle was at or about that time, or shortly before, blown for this station, and if you also find that as the train was approaching the station, and within a short distance therefrom, the defendant, by its brakeman, after having announced the station, opened the front door of the coach in which plaintiff was riding, fastened the door back, and himself went onto the front platform

of said coach while the train was yet in motion, such acts of the defendant, under such circumstances, would not be an invitation to the plaintiff to alight from said train at said time or place, or at any time or place, until the car in which she was riding had come to a full stop. Plaintiff, under such circumstances, would have no right to attempt to alight from said car until the same had come to a full stop.

“(18) If you find and are satisfied, from the preponderance of the evidence, that at the time and place, and when and where, the plaintiff attempted to alight from the car in which she was riding, the same was in motion, and that the said car had not come to a full stop, and notwithstanding plaintiff may have believed and thought at the time that she had arrived at her station, and that the train was about to or had already stopped, yet if, under such circumstances, she attempted to voluntarily alight from the train without the direction, invitation, or command of the defendant at the time, and if such act upon her part caused or contributed to the injuries which she received, she must be held to have assumed the risk of the injuries which she did receive, and she would not be entitled to recover. Under such circumstances, the defendant would not be liable, and your verdict must be for the defendant.”

“(22) I instruct you that the defendant was not an insurer of the safety of the plaintiff, or that she would travel upon its train and be delivered at its station at Springfield without injury or accident, but the defendant was bound to exercise that degree of care reasonably consistent with its business of a common carrier, and being the highest degree of practical care, diligence, and skill consistent with the mode of transportation. The defendant was not an insurer against accident, but was bound to a very high degree of care, and, while this is so, the plaintiff was also

bound to exercise that degree of care for her own safety and protection which a reasonably prudent person, riding upon a car transported by steam, would suggest and require. She was bound to exercise her sense of sight, hearing, and circumspection, and was under the necessity of taking no risks which a prudent person, under like circumstances, would not assume or take. It was her duty to remain in the car seat until the station was announced and the train had come to a stop, and she could not, without assuming the risk of injury or accident, leave the car, and go out upon the platform, and attempt to alight therefrom, while yet the train was in motion; and if she should do so before the train had stopped, and should, as the train was almost stopped, and, as she may have mistakenly supposed, actually stopped, undertake to alight from the train, although the train had not in fact stopped, and she was thereby injured either by falling from the car or being jerked therefrom by the jerk or movement of the car ordinarily incident thereto, and before the train had come to a full stop at the station, then she must be held to have assumed the risk of any injury which she may have received, and cannot recover."

A carrier of passengers is not an insurer of their safety, and the twenty-second instruction simply amplified the tenth, in relation to the reciprocal duties of the respective parties. The announcement of the station, or the brakeman's offer to assist plaintiff to alight, as stated in the seventeenth instruction, did not authorize her to leave the train until it came to a full stop. So, too, if plaintiff, while the train was in motion, voluntarily attempted to alight without the invitation, direction or command of the defendant, as stated in the eighteenth instruction, and was injured, her negligence would preclude a recovery. But if the signal whistle was given, the station announced in the car in which she was rid-

ing, and the train stopped before reaching the depot, or was moving so slowly that it appeared in the car, to plaintiff as a reasonably prudent person, to be stationary, and if the brakeman then offered to assist her to alight, in pursuance of which she rose and followed him, and he opened and held the car door back while she passed to the platform, and if he stood thereon with his side towards her while she descended the car steps, after receiving no response to her request to take her valise, and, the night being dark, if the station lamp was unlit, so that plaintiff could not observe that the train was moving, and if the brakeman did not warn her of the danger, she was warranted in believing that the train had stopped: *Bartholomew v. New York, etc. R. R. Co.* 102 N. Y. 716 (7 N. E. 623).

In *Southern Kan. Ry. Co. v. Pavey*, 48 Kan. 452 (29 Pac. 593), a passenger having been informed by the conductor that she must change cars at Ottawa, her pass, given in exchange for a ticket, was taken up as the train approached said city; and, thereafter, the brakeman having announced "Ottawa," the train was soon stopped at a railway crossing before reaching the depot; and the night being dark, and the defendant in error, a stranger in Ottawa, supposing it was the proper time to alight, rose, and with her husband and child, started towards the rear door of the car to get off, passing the conductor, who occupied a seat back of them, and meeting the brakeman at the car door as they were going out, neither of whom said anything to them. As the defendant in error was descending the car steps, her husband, with the baby, having alighted, the train was suddenly started with a jerk, and she fell and was injured. At the trial of the action brought by her for the injury, an exception was taken to the following instruction: "If the brakeman upon the platform saw her descend the steps as if

to get off the train, and failed to warn her of the danger, these are matters from which the jury are authorized to find negligence on the part of the company, and sufficient to authorize a recovery, unless, as before stated, she herself was guilty of negligence contributing to the injury." A judgment having been rendered for the passenger, the company sued out a writ of error, and Mr. Justice VALENTINE, referring to the instruction, in affirming the judgment, says: "There was no evidence introduced to show that the brakeman was upon the platform while the plaintiff was descending the steps as if to get off the train, or that he saw her descending the steps, unless by very remote inference. He did, however, under the plaintiff's evidence, see the plaintiff and her husband, with their wraps, their basket and their baby, go out of the car as if to get off the train, which is substantially the same thing as is mentioned in the instruction of the court; and yet, notwithstanding the fact that he saw all these things, he still failed to warn her or her husband of any danger, or to give them any information. It is possible that he saw her descending the steps, but the evidence does not show it, unless by possible inference. From what he did see, however, we think it was just as much his duty to have warned the plaintiff of the danger as it would have been if he had seen her descending the steps."

If the jury believed plaintiff's testimony, they might reasonably have found therefrom that the brakeman knew that she followed him to the car platform to alight, and that, having failed to warn her of the danger which he was presumed to know, and which by reason of the darkness she could not perceive, the defendant was negligent in this respect. Construing the thirteenth instruction with the twelfth, of which it is the logical sequent, the eleventh and thirteenth instructions, when read in

connection with the seventeenth and eighteenth, fairly illustrate the law applicable to the case in the particulars to which attention has been called in construing them.

14. In other respects, it will be observed that these instructions are somewhat conflicting, and this presents the question whether the judgment should be reversed for that reason. In *Morrison v. McAtee*, 23 Or. 530 (32 Pac. 400), Mr. Justice BEAN, speaking of such instructions, says: "The giving of inconsistent and contradictory instructions is error, because the jury will be as likely to follow the one as the other, and the fact that the law may be accurately stated on one side will not obviate error, if thus given for the other party." In that case it was alleged that a contract was entered into whereby the defendant's testator agreed to support plaintiff during his life, in consideration of such service as the latter might be able to render. The testator having died, plaintiff's claim against his estate for an allowance on account of such support was rejected by the executor, but the county court allowed the claimant the sum of \$1,125. An appeal therefrom having been taken, at the trial thereof the circuit court, at the executor's request, instructed the jury that, "if you should find for the plaintiff, then you should deduct from the amount otherwise necessary to support the claimant any amount which he could reasonably earn during the same time for himself." In another instruction the court, at the claimant's request, told the jury that, if they should find in favor of the plaintiff, they should "assess his damages at such sum as will give him a reasonable and comfortable support during the probable length of Morrison's life, commencing from the twelfth day of November, 1890, the date of McAtee's death." A verdict for about \$1,400 having been returned, judgment was given thereon, and the executor appealed, and, having excepted to the latter in-

struction, the judgment was reversed, because said instructions were inharmonious, conflicting and misleading, and it was impossible to tell which rule the jury adopted in arriving at their verdict. In the case at bar, however, no difficulty is encountered in determining which instructions were adopted by the jury in reaching their conclusions.

The instructions given by the court of its own motion were correct expositions of the law. Those given at defendant's request restricted the former in some particulars; but, as the jury found for the plaintiff under the instructions given upon the court's motion, it is evident they were not misled by the latter instructions, and, unless they have been so misled, inconsistent instructions are not grounds for reversal of a judgment: 2 Thompson, Trials, § 2401; *Kelly v. Cable Co.* 7 Mont. 70 (14 Pac. 633); *People v. Velarde*, 59 Cal. 457; *People v. Smith*, 59 Cal. 601; *People v. Ah Luck*, 62 Cal. 503; *People v. Turcott*, 65 Cal. 126 (3 Pac. 461); *Dennison v. Chapman*, 105 Cal. 447 (39 Pac. 61).

15. The court said to the jury: "There is evidence on behalf of the plaintiff to the effect that the train did come to a standstill," etc., and "there is evidence before you tending to show that the accident occurred at about 9 o'clock," etc. An exception having been taken to this portion of the charge, it is maintained that the court thereby presented to the jury the facts of the case in violation of the statute prohibiting it: Hill's Ann. Laws, § 200. In *State v. Brown*, 28 Or. 147 (41 Pac. 1042) it was held that an instruction stating that there is evidence "to the effect" or "tending to show" a certain fact in issue, but leaving to the jury the finding of such fact, did not contravene the provisions of the statute. See, also, *Coos Bay R. R. Co. v. Siglin*, 34 Or. 80 (53 Pac. 50, 11 Am. & Eng. R. R. Cas. 715). We do not think the court at-

tempted to state the facts to the jury, but to call attention to the theories of the respective parties; for it said in another instruction: "There is evidence on the part of the defendant to the effect that the train did not stop."

Exceptions were taken to the court's refusal to give certain instructions requested by the defendant, but such instructions were, in our judgment, properly refused. A careful examination of the record leads us to believe that none of the errors assigned were prejudicial to the defendant, and hence it follows that the judgment is affirmed.

AFFIRMED.

Decided 10 January, 1898.*

CORDER v. SPEAKE.

[51 Pac. 647.]

SCOPE OF MOTIONS TO DISMISS OR AFFIRM.

1. A motion to dismiss an appeal or to affirm a judgment proceeds on the theory that the appellate court is without jurisdiction, or that the appellant has not complied with some rule of court, and unless one of these conditions is made to appear the motion must be overruled.

MOTION TO DISMISS—CONSIDERATION OF THE MERITS.

2. In passing on a motion to dismiss an appeal the merits of the case will not be considered.

MODIFICATION OF DIVORCE DECREE—ALIMONY.

3. A modification of the alimony clause of a divorce decree can be made only by a motion in the original suit. Under Section 502, Hill's Ann. Laws, the court retains jurisdiction for that purpose.

ALLOWANCE OF ATTORNEY'S FEES.

4. In an independent suit brought by a husband to modify a decree fixing the amount of permanent alimony made in a divorce suit, the court has no power to direct the husband to pay the wife's counsel fees.

From Multnomah: LOYAL B. STEARNS, Judge.

*NOTE.—No briefs have yet been filed in this case, and the Chief Justice directs that the decision on this motion be now officially published.—REPORTER.

37	106
37	146
37	103
40	808
40	484
37	106
43	544

Suit by Fred W. Corder against Isabella Speake. From a judgment of dismissal, plaintiff appeals. Motion to dismiss.
DENIED.

Mr. Cicero M. Idleman, for the motion.

Mr. Ralph R. Duniway, contra.

MR. CHIEF JUSTICE MOORE delivered the opinion.

This is a motion to dismiss the appeal, and for an order directing plaintiff to pay defendant the sum of \$250, to enable her to make a defense. The facts are: On July 5, 1892, the Circuit Court of Multnomah County rendered a decree dissolving the marriage contract theretofore existing between the parties, restoring to defendant her maiden name, and awarding her the sum of \$25 per month for her maintenance. In December, 1895, defendant, having received but \$175 on account of said award, commenced an action against plaintiff in the Superior Court of Alameda County, California, to recover the sum of \$1,083.33, alleged to be due thereon, which action is still pending in that court. On January 30, 1896, the Circuit Court of Multnomah County overruled a motion by plaintiff to modify the order making a monthly allowance for defendant's maintenance, from which latter order no appeal had been taken. Thereafter plaintiff commenced this suit for the modification of the decree, alleging in his complaint that during the pendency of the original suit it was agreed between the parties that he should pay the sum of \$25 per month for the period of one year only, which defendant agreed to accept in full satisfaction of all demands for her maintenance; that he was thereby led to and did believe that she would ask for and obtain a decree in accordance with this agreement, and relying thereon, he did not appear in said suit,

and had no knowledge of the provisions of the decree until defendant, in October, 1895, demanded the amount claimed to be due thereunder; that in December, 1895, he tendered to her the sum of \$125, as the whole amount due under said agreement, which she refused to accept, but did not deposit it in court as a condition precedent to the relief demanded; that on January 26, 1897, the court, upon defendant's motion, supported by her affidavit that she was without means to employ counsel, ordered plaintiff to pay to its clerk the sum of \$50 within fifteen days, to enable her to make a defense; but, having neglected to comply therewith, the suit was dismissed, and plaintiff appeals.

1. A motion to dismiss an appeal or to affirm a judgment challenges the jurisdiction of the appellate court, or shows that the appellant, in the preparation of his case for trial, has failed to comply with the rules of such court: 2 Enc. Pl. & Prac. 335; *Swanson v. Leavens*, 26 Or. 561 (40 Pac. 230). The transcript shows that the appeal was taken in the manner and perfected within the time allowed by law, and it also appears that appellant filed the abstract of the record, as prescribed by the rules of this court (24 Or. 591, 37 Pac. vi.), and, such being the case, the motion to dismiss the appeal must be denied.

2. It is contended, however, by counsel for defendant, that the complaint shows that plaintiff is not entitled to any equitable relief, that his suit is instituted for delay only, and that he has an adequate remedy at law; but the points insisted upon will not be considered at this time, for to do so would amount to a trial on the merits, which, if permitted, might tend to encourage the practice of adopting a motion to dismiss as a means to insure a speedy trial on the issues involved, thereby seriously interfering with the regular order of business, and depriving others of their right to have their causes tried in suc-

cession as they appear upon the calendar : Elliott, App. Proc. § 522 ; 2 Enc. Pl. & Prac. 347 ; *Foscalina v. Doyle*, 48 Cal. 151.

3. The statute authorizes the court, upon motion, to set aside, alter, or modify so much of a decree of divorce as relates to the maintenance of either party to the suit : Hill's Ann. Laws, § 502. It will thus be seen that, while the dissolution of the marriage contract has become final, the court rendering the decree nevertheless retains jurisdiction of the cause for such purpose, and hence a motion to modify that part of the decree which remains open must be made in the original suit.

4. While the case at bar is instituted to set aside the decree for fraud alleged to have been practiced by the prevailing party, it is no part of the original suit ; and, if it be admitted that this court has authority to compel a party to contribute a reasonable sum to his adversary as attorney's fees upon appeal from an order modifying or refusing to alter the allowance made for alimony, it is powerless to make any order to that effect in an independent suit, in the absence of some statute authorizing it. In the case before us there is no divorce suit pending between the parties, and, the decree in that respect having become final, this court has no more power to compel plaintiff, in an independent suit, to provide for the payment of defendant's counsel fees, than it would in a suit with any other person (*McQuien v. McQuien*, 61 How. Prac. 280); and hence it follows that the application is denied.

MOTION OVERRULED.

Argued 19 February; decided 16 April, 1900.

HERSHBERGER v. JOHNSON.

[80 Pac. 888.]

CHATELS—ANNEXATION TO REALTY.

Where an engine, boiler and sawmill machinery are placed on leased ground under an agreement that they should not become realty, they will retain their distinctive identity unless they are so annexed to the land that their removal will injure the land or destroy their value: *Landigan v. Mayer*, 32 Or. 245, applied.

From Lane: J. C. FULLERTON, Judge.

Suit by N. L. Hersberger against A. J. Johnson, Sheriff of Lane County, and others, for an injunction. A decree having been entered for defendants, plaintiff appeals.

REVERSED.

For appellant there was a brief and an oral argument by *Messrs. John M. Williams* and *L. Bilyeu*.

For respondents there was a brief over the names of *A. C. Woodcock* and *Daly & Hayter*, with an oral argument by *Mr. John J. Daly*.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

This is a suit to enjoin the Sheriff of Lane County from taking certain personal property, consisting of a boiler, engine and sawmill complete, with belts, saws, pulleys, shafting, and all other appliances, machinery, tools, etc., attached thereto, or in anywise appertaining or belonging to said boiler, engine, or sawmill, from the possession of plaintiff. The injunction being dissolved and complaint dismissed, the plaintiff appeals.

The defendants claim ownership under a sheriff's sale in pursuance of an execution issued out of the circuit court in a cause wherein J. W. Crider was plaintiff and Levi P. Hershberger was defendant. The property had

previously been attached in said action as real estate on April 5, 1897, judgment and an order of sale having been given and entered meanwhile. The plaintiff claims ownership under a constable's sale by virtue of an execution issued out of a justice's court in a cause wherein one S. A. Staver was plaintiff and Levi P. Hershberger, J. A. Yoder, and J. D. Mishler were defendants. The execution was levied March 15, 1897, and sale made April 27 following. On the day of the levy of the execution in that case a writ of attachment was issued out of the justice's court in another cause, wherein Mitchell, Lewis & Staver Co. was plaintiff and Levi P. Hershberger and J. D. Mishler were defendants, and the same property attached. Judgment was entered in the latter cause March 25, 1897, wherein the attached property was ordered sold. Execution was issued in this cause April 15, and a sale had of the attached property at the same time as under the previous execution. The plaintiff's predecessor became the purchaser under both these executions. In the levy the property was treated as personalty, and was sold and purchased as such at the execution sales. The liens acquired under the justice's writs antedate the attachment in the case of Crider against Levi P. Hershberger, and the pivotal question presented is whether the property was personalty or real estate. If the former, the plaintiff has acquired the prior title; otherwise not. The boiler, engine and sawmill, with the belts, etc., attached, are situated upon leased land, and were placed thereon by Levi P. Hershberger, under an express agreement with the owners of the land couched in the lease, to the effect that they should not become a part of the realty. Of this condition the defendants, or, at least one of them, had notice, as they set forth the alleged facts in their answer, which would indicate as much. The rule is now well estab-

lished that, when things personal in their character are about to be annexed to realty, parties may, in anticipation of such annexation, by express agreement provide that such chattels shall retain their character and status as personalty; and if they do not, by their annexation, lose their distinctive identity, and thereby become so essentially a part of the realty that their removal will materially injure or destroy the realty, or destroy or unnecessarily impair the value of the chattels, their original character will be preserved by the agreement. Such is the effect of the decisions of this court. See *Henkle v. Dillon*, 15 Or. 610 (17 Pac. 148); *Landigan v. Mayer*, 32 Or. 245 (67 Am. St. Rep. 521, 51 Pac. 649). We only know from a general description of the property what its character is, but from this it is apparent that it is of such a nature as to admit of an agreement to preserve its original identity, although it may have been attached to the soil for the purposes of its operation and use. This being the only question involved, in the view we have taken of the controversy, the decree of the court below will be reversed, and one here entered making the injunction perpetual.

REVERSED.

Argued 15 February; decided 16 April, 1900.

HUGHES v. LINN COUNTY.

[60 Pac. 843.]

EQUITY—CLOUD—SALE ON VOID TAX PROCESS.

1. Under the general jurisdiction to prevent clouds on titles, equity will entertain a suit to restrain the sale of realty on a void tax process.

AFFIDAVIT ON DELINQUENT TAX ROLL—VOID WARRANT.

2. An affidavit of a sheriff attached to a statement of delinquent taxes, that such statement is correct, and that the taxes in such annexed delinquent list are unpaid, is not in compliance with Hill's Ann. Laws, §§ 2800, 2810, requiring the sheriff to return to the county court a statement of unpaid taxes, and section 2811 declaring that he shall annex thereto an affidavit that the facts set forth in such statement were correct, that the sums returned unpaid were not paid, and that on diligent inquiry he had been unable to discover goods or chattels of the persons charged therewith whereon to levy the same.

37	111
38	437
37	111
440	530
37	111
48	361
37	111
47	446

COLLECTION OF TAXES—AFFIDAVIT OF SHERIFF.

3. Under the laws of Oregon personal property is the primary fund to be resorted to for the compulsory payment of taxes, and the return of the sheriff on the tax roll is the only evidence to be considered in ascertaining whether the county court had authority to order the sale of realty for unpaid taxes.

COLLECTION OF TAXES—COMPLIANCE WITH STATUTES.

4. Proceedings for the collection of taxes are summary and *ex parte*, and it must affirmatively appear that all statutory requirements have been strictly complied with in order to authorize the sale of land thereunder.

OBJECT OF AFFIDAVIT TO DELINQUENT ROLL.

5. The object of requiring the affidavit described in Section 2811 of Hill's Ann. Laws to be attached to the return of unpaid taxes is to officially convey to the county clerk the information necessary to authorize the issuance of a warrant for the collection of the unpaid taxes from real property, and the warrant cannot legally be issued unless that affidavit accompanies the delinquent roll.

CONSTRUCTION OF ORDER TO COLLECT DELINQUENT TAXES.

6. An order by a county court that the sheriff proceed to levy on and sell all property delinquent for taxes for a certain year is not a compliance with Hill's Ann. Laws, § 2818, providing that all unpaid or delinquent taxes may be collected from the land taxed, or the persons, firms or corporations against whom levied, on the order of the county court directing that a warrant be issued; since such order does not direct the issuance of a warrant for the purpose of collecting such tax from the land taxed.

VOID DELINQUENT TAX WARRANT.

7. A warrant directing the collection of delinquent taxes, issued without the filing of the affidavit required by Section 2811, Hill's Ann. Laws, is void so far as it commands the levy on and sale of real estate.

From Linn: HENRY H. HEWITT, Judge.

Bill by S. A. Hughes and others against Linn County and M. C. Gaines, sheriff, to enjoin the sale of certain real property belonging to the plaintiffs for taxes assessed against a former owner. In 1895 the property in question was owned by and assessed to D. B. Monteith, who thereafter conveyed it to the plaintiffs, in payment and satisfaction of a mortgage. In 1897, the taxes for 1895 not having been paid, the Sheriff of Linn County levied upon the property, and advertised it for sale, when plaintiffs brought this suit on the ground that the process under which he was proceeding was void. It was tried upon a demurrer to the answer, from which it appears that in February, 1896, the assessment roll for the year 1895 was

delivered to the sheriff, with the usual warrant attached, authorizing and directing him to proceed to collect the taxes charged thereon. On June 30 he made a return of the delinquent taxes to the county court, as prescribed by law, with an affidavit attached thereto, as follows :

"STATE OF OREGON, }
County of Linn. } ss.

I, J. A. McFeron, Sheriff of Linn County, Oregon, being first duly sworn, say that the foregoing statement is correct. That the sum of taxes for the year 1895 returned as unpaid are unpaid.

[Signed]

J. A. McFeron,
Sheriff of Linn County, Oregon.

Subscribed and sworn to," etc.

On July 10, 1896, the county clerk made a list of the taxes returned as unpaid from the delinquent tax roll, as required by statute, and delivered the same to the sheriff, with a warrant attached commanding him to levy upon the goods and chattels of such delinquent taxpayers, or, if none be found, upon the real property set forth in the delinquent list, or so much thereof as would satisfy the amount of taxes, with costs, etc. On the eleventh of June, 1897, the sheriff returned such delinquent list and warrant with the following affidavit attached :

"STATE OF OREGON, }
County of Linn. } ss.

I, M. C. Gaines, Sheriff of Linn County, Oregon, being first duly sworn, say that the foregoing statement is correct. That the sum of taxes in the annexed delinquent list of taxes for the year 1895 returned are unpaid.

[Signed]

M. C. GAINES,
Sheriff of Linn County, Oregon.

Subscribed and sworn to," etc.

Immediately thereafter the county clerk prepared a list and roll of the taxes then remaining unpaid for the year 1895, including those assessed against Monteith on account of the real property in question, and on September 9, 1897, the county clerk made and entered the following order: "In the matter of the delinquent tax roll for the year 1895, Linn County, Oregon. Now, on this day, it is ordered by the county court that the Sheriff of Linn County, Oregon, proceed to levy on and sell all property delinquent for taxes for the year 1895 on and after the thirtieth day of September, 1897." The delinquent tax list was thereafter delivered to the sheriff, with a certified copy of the order of the county court attached, together with a warrant authorizing and commanding him to proceed to sell the property described in the roll, or so much thereof as was necessary to satisfy the amount of taxes so charged, with costs and expenses thereof; and he was proceeding to execute such warrant when this suit was commenced. Upon the facts the court held that plaintiffs were not entitled to the relief demanded, and they appeal.

REVERSED.

For appellants there was a brief over the name of *Weatherford & Wyatt*, with an oral argument by *Mr. James K. Weatherford*.

For respondents there was a brief over the names of *Samuel L. Hayden, H. C. Watson, and Whitney & Newport*, with an oral argument by *Mr. Watson and Mr. N. M. Newport*.

MR. JUSTICE BEAN, after stating the facts, delivered the opinion of the court.

1. It is well to observe at the outset that this is not a suit to enjoin the collection of taxes, nor is it a controversy between the taxpayer and the county authorities.

It is a suit brought by the owner of real estate to prevent a cloud upon his title by a sale on a void process for taxes assessed against a former owner; and therefore *Welch v. Clatsop County*, 24 Or. 452 (33 Pac. 934), and similar decisions, holding that a court of equity will not interfere by injunction at the suit of a taxpayer to restrain the collection of a tax merely because of an alleged illegality or irregularity appearing upon the face of the assessment, has no application to the case in hand. This suit comes within the well-recognized jurisdiction of courts of equity to prevent clouds upon title: 3 Pomeroy, Eq. Jur. § 1398; *Johnson v. Hahn*, 4 Neb. 139.

2. The contention for plaintiffs is that the warrant under which the sheriff is threatening to sell their property is void, because the affidavit of June 30, 1896, attached to the return of delinquent taxes, fails to show that the sheriff had not, upon diligent inquiry, been able to discover any goods or chattels belonging to Monteith upon which to levy. A reference to the provisions of the statute, and to some elementary principles of law, will be sufficient to indicate the soundness of this position. By Section 2794, Hill's Ann. Laws, as amended in 1893 (Laws, 1893, p. 118), the county clerk is required, within fifteen days after the apportionment of taxes, to make a certificate of the several amounts apportioned to be assessed upon the taxable property in his county, etc., and deliver the same to the sheriff, together with a transcript of the assessment roll, to which he shall attach a warrant commanding the sheriff to collect the taxes charged in such list; to make the same by sale of the goods and chattels of the respective parties named on such list, if necessary; to pay over all money collected by him to the county treasurer, and return such warrant and list to the county court within a specified time. Sections 2803-2807 provide for the levy upon and sale of the goods

and chattels of the taxpayer in case he shall refuse or neglect to pay the tax imposed on him. Sections 2809–2811 provide that, if any of the taxes mentioned in the tax list shall remain unpaid, and the sheriff shall be unable to collect the same, he shall make out a statement thereof, and submit the same to the county court within a certain designated time, to which shall be attached his affidavit “that the facts set forth in said statement are correct; that the sums therein returned as unpaid are not paid; and that he has not, upon diligent inquiry, been able to discover any goods or chattels belonging to the persons charged with such unpaid taxes whereon he could levy the same,—which statement and affidavit shall be filed with the county clerk, and he shall thereupon be credited by the county court with the amount of taxes so returned as unpaid and doubly assessed.” Section 2814 makes it the duty of the county clerk, within ten days after such return, to make from the delinquent tax roll a true and correct list of the taxes returned as unpaid, and a correct description of the lands or town lots assessed, if the same can be made, and deliver the same to the sheriff of the county, with a warrant attached commanding him to levy upon the goods and chattels of the delinquent taxpayer, and, if none be found, then upon the real property, as set forth in the tax list, or so much thereof as shall satisfy the amount of taxes so charged, with costs and expenses. Section 2815 provides that a warrant for the purpose of collecting delinquent taxes shall be deemed an execution against property, and be executed and returned in like manner; section 2816, that, if no personal property be found whereon to levy the warrant, or if that levied upon be not sufficient to satisfy the same, it must be levied upon any real property of the person, firm, or corporation against whom the taxes are levied or charged, or sufficient thereof to satisfy such warrant; section 2817,

that, in case of any delinquent tax levied upon real property, the owner being unknown or absent, or having conveyed the same to another by deed or otherwise, the warrant shall be executed by levying upon any property he may own for the amount of taxes levied on all his property in the county. Section 2818 reads as follows: "All taxes heretofore or hereafter levied by or in any county in this state remaining unpaid or delinquent may, upon the order of the county court directing that a warrant be issued, be collected from the land taxed, or the person, firm or corporation, whether known or unknown, against whom the same were levied by warrant, in the manner and with the effect provided in this chapter for the collection of delinquent taxes."

3. It is apparent from these several provisions of the statute that personal property is the primary fund to which resort must be had for the compulsory payment of taxes. There is no power or right given by statute to sell land, except in the event that the sheriff cannot, upon diligent inquiry, discover any goods or chattels belonging to the persons charged with such taxes whereon he could levy the same, and the only evidence of that fact is the affidavit which the officer is required to attach to the delinquent list. Mr. Burroughs, in discussing this question, says: "The owners of real estate being primarily liable for the payment of the tax assessed, after the tax list has been placed in the hands of the proper officer for collection, the first step thereafter is an official return by such officer showing the failure to make the tax out of the goods and chattels of the owner, as directed by his precept. Such a return by the officer is called the 'delinquent list.' It is returnable to some officer or some court of inferior jurisdiction, or some court of general jurisdiction vested with special powers as to tax proceedings. The return of this delinquent

list is absolutely essential. Where the statute prescribes the form of the return, it must be followed, and all requirements as to the time in which it is to be made, and its authentication, must be strictly followed. If the collector or other officer is required to make oath, it must be complied with, and all facts required to be stated in the affidavit must appear:" Burroughs, Tax'n, § 111. And Mr. Cooley, in speaking on the same subject, says: "Where a tax against lands is assessed to a resident, and is a personal charge against him, the statutes, with almost unvarying uniformity, have made the personal property of the person taxed the primary fund for the satisfaction of the tax, and have given a remedy for enforcing payment from it. Until that remedy has been exhausted, no authority exists to go further. * * * To authorize further proceedings, * * * there must be the proper official evidence that * * * the remedy against the personalty is exhausted, and * * * that the taxes are still unpaid. This evidence will consist of such official return, affidavit, or other document by the collector as the statute may indicate, and it must be made in due form of law, and at the proper time. A return made prematurely is void, though it be but a single day before the time; for it shortens to that extent the period allowed to the taxpayer, * * * and thus deprives him of a legal right. So a return is void which fails to set forth all the facts that the statute requires shall be shown by it. If the collector is required to demand the tax, his return, it would seem, should show that he has done so; if he is required to make collection by distress and sale of goods, if any can be found to levy upon, there should be such a showing of diligent search for goods, and failure to find them, as would be required of officers to whom executions are committed for service. In other words, the return should show full and com-

plete compliance with all the conditions which, under the statute, are to precede a resort to the land. Such is unquestionably the general conclusion of the authorities:” Cooley, Tax’n (2 ed.), 454.

4. This doctrine is but an application of the general rule that in an *ex parte* proceeding for the sale of land under special authority great strictness is required, and it must affirmatively appear that every substantial requisite of the law has been observed. Proceedings for the collection of taxes are necessarily summary and *ex parte*, and hence the rule is universal that all statutory requirements must be strictly and punctiliously complied with, in order to authorize the sale of land therefor: Blackwell, Tax Titles (3 ed.), 64, 66; *Thatcher v. Powell*, 19 U. S. (6 Wheat. 119); *Simms v. Greer*, 83 Ala. 263 (3 South. 423); *Wartensleben v. Haithcock*, 80 Ala. 565 (1 South. 38). These are practically elementary principles, and do not require a further citation of authorities.

5. The claim of the defendants, however, is that the affidavit required by section 2811 to be attached to the delinquent list is only for the information of the county court, and as a basis for its settlement with the sheriff. But, in our opinion, the statute is not susceptible of this construction. The evident object of the affidavit is to form the basis for the subsequent issuance of a warrant authorizing the sale of real property. As we have already said, personal property is the primary fund to which resort must be had, and it is only when such property of the taxpayer cannot be found, after reasonable diligence, that resort may be had to the real estate.

6. Again, it is claimed that the county court is authorized and empowered by section 2818 to direct that a warrant be issued for the collection of taxes remaining unpaid or delinquent from the land taxed, without regard to previous irregularities, and that the warrant in question

was issued in pursuance of such an order. The proper construction of the section referred to has often been a mooted question in this court, and no satisfactory interpretation thereof has yet been suggested. But, whatever its significance, an inspection of the order made by the county court in September, 1897, shows that it does not comply with the provisions of the statute by ordering and directing that the tax be collected from the land taxed, and that a warrant issue for that purpose. It is simply an order that the sheriff proceed after a certain date to sell all property delinquent for taxes for the year 1895, which is nothing more than a direction to him to proceed to execute any process in his hands for that purpose.

7. We conclude, therefore, that the failure of the sheriff to make and attach to his return of delinquent taxes the affidavit required by section 2811 renders the warrant subsequently issued void, so far as it commands him to levy upon and sell the real estate. The decree of the court below is therefore reversed, and a decree will be entered here in favor of the plaintiffs.

REVERSED.

Decided 23 April, 1900.

BENSON v. KELLER.

[60 Pac. 918.]

PLEADING—MULTIFARIOUSNESS.

1. The subject of multifariousness in pleading is reviewed, and the conclusion reached that much must be left to the discretion of the court to determine whether a bill is multifarious, arising from a misjoinder of defendants therein.

MULTIFARIOUSNESS OF BILL TO CANCEL INSTRUMENTS.

2. A bill to cancel several duebills alleged to have been fraudulently procured from plaintiff by one of the defendants, and then transferred to other of the defendants severally, is not multifarious, though some of the defendants may be put to additional expense in trying the case away from their home county.

FRAUD—ADEQUATE REMEDY AT LAW.

3. B, being in possession of sundry valuable duebills, was induced by K, through certain fraudulent representations, to deliver them to him for the purpose of paying a debt of B's, but the duebills were hypothecated for K's personal debts. B thereupon began a suit in equity to secure a return of the duebills.

Held, that an action of damages against K for deceit would not be as efficient as the remedy in equity, even if K was solvent: *South Portland Land Co. v. Munger*, 36 Or. 457, cited.

NEGOTIABLE PAPER—BONA FIDE HOLDER—FOR VALUE.

4. A holder of negotiable paper is not a purchaser for value where he took the paper before maturity, without notice of any infirmity, under an agreement to make future advances, but made the advances after notice of an infirmity.

NEGOTIABLE PAPER—BONA FIDES—NOTICE OF FRAUD.

5. A statement to a holder of negotiable paper by the maker that he had been requested by the person in whose interest the paper was executed to withhold payment, together with a statement by the attorney of the maker that the paper had been obtained by fraudulent practices, and that he intended to sue at once for the return of the paper, is sufficient notice of infirmity in the paper to cause the holder to make further advances on it to his assignor at his peril.

From Multnomah: JOHN B. CLELAND, Judge.

The facts out of which this controversy arises may be briefly stated as follows: The Columbia Packing Co. is a corporation organized with a capital stock of \$15,000, divided into shares of \$100 each, only eighty of which were subscribed,—A. A. Bonney taking forty; E. C. Phirman twenty; and George Keller, twenty. A meeting of the stockholders was held September 16, 1890, at which they were all elected directors, and on the same day the directors, at a regular meeting, elected Bonney president, Keller secretary, and Phirman treasurer; but no regularly called meeting of the stockholders or directors was thereafter held until December 27, 1894. The corporation in the meantime engaged in the business for which it was organized. About November, 1890, Bonney pledged twenty shares of his stock to A. V. Anderson, to secure the payment of \$1,500, and the balance of it in March, 1891, to B. S. Bonney, to secure the payment of \$3,800. Thereafter Anderson and B. S. Bonney assigned their evidence of indebtedness, together with the stock pledged for its security, to C. W. Rice; and later, but prior to December 7, 1894, Rice began proceedings for the foreclosure of his lien upon the stock, and on March 15, 1895, became the owner thereof by purchase at sheriff's

sale. On September 25, 1890, Phirman and Keller pledged their stock to A. A. Bonney to secure the payment of certain sums advanced,—\$1,800 to Phirman, and \$1,703 to Keller. In October following, Bonney transferred his evidence of indebtedness, together with the stock pledged, to one S. W. R. Jones, to secure his indebtedness to Jones. On May 2, 1892, Bonney, Phirman, and Keller entered into an agreement whereby they mutually stipulated and agreed that each should receive an equal share of the profits earned by said company subsequent to September 2, 1891, notwithstanding the inequality in the number of shares of capital stock appearing to the credit of each upon the company's books, and that, as soon as the certificates of stock theretofore issued and pledged should be redeemed, the same should be canceled, and a certificate issued to each of the parties for an equal number of shares, and that the parties should thereafter be equal owners of the capital stock of the company.

On December 7, 1894, Keller entered into a written agreement with one R. H. Guthrie, whereby, for a consideration named, he sold, assigned, and transferred to Guthrie all his interest in and to twenty-six and two-thirds shares of the capital stock of the company, reserving to himself all the accrued profits of said company's business represented by the uncollected book accounts, notes, and demands due to said company on November 16, 1894, which should thereafter become dividends upon said shares of stock. The document then recites the aggregate of the outstanding accounts, the amount of present indebtedness, the manner in which the outstanding stock of the company was then held, and the agreement of the stockholders concerning the same. The twenty shares of capital stock theretofore pledged by Keller to A. A. Bonney were accordingly assigned to Guthrie, who on December 27, 1894, was duly recognized

as a stockholder of the company at a regularly called meeting of the stockholders and directors. On the said seventh day of December Keller attempted to secure from the company an agreement containing a stipulation upon its part to collect as soon as practicable sufficient of its outstanding accounts, notes, and demands to satisfy the indebtedness incurred prior to said November 16, 1894, amounting to \$2,011.83, and transfer one-third of the remainder thereof, to wit, \$11,657.42, or \$3,885.80, to Keller, and thenceforth hold him harmless from said indebtedness; Keller agreeing upon his part that upon the assignment to him of the said one-third of the accounts, notes, and demands, he would release the company from all liability to him for dividends. This agreement purports to be signed by R. H. Guthrie, president *pro tem.*, and George Keller, and has the corporate seal attached. At this time T. C. Benson, the plaintiff herein, was indebted to the company in a sum largely in excess of \$3,000, and J. G. & I. N. Day were indebted to Benson in a sum much larger than that amount. Thereafter, on the twenty-fourth and twenty-seventh days of December, 1894, Keller, by representing to Benson that he was authorized to collect of the amount due from him to the company the sum of \$3,000, and that he would procure from the company a receipt and release for that amount, induced him to procure from J. G. & I. N. Day their sixteen duebills, payable to the order of Keller, eight of which, aggregating \$1,500, were to mature January 15, 1895, and the others, amounting to \$1,500, to mature February 15, 1895. Keller transferred the duebills falling due January 15 to The Dalles National Bank, as collateral security for future advances, and the others to Bissinger & Co., of Portland, Oregon. Benson brings this suit to have the duebills surrendered up and canceled, and joins with The Dalles National Bank, as de-

feudants, George Keller, Bissinger & Co., J. G. & I. N. Day, and the Columbia Packing Co. The decree of the court below, in so far as it concerns the controversy here, was in favor of the plaintiff and against The Dalles National Bank, and the bank appeals. **AFFIRMED.**

For appellant there was a brief over the name of *Snow & McCamant*, with an oral argument by *Mr. Wallace McCamant*.

For respondent there was a brief over the name of *Carey & Mays*, with an oral argument by *Mr. Franklin P. Mays*.

MR. CHIEF JUSTICE WOLVERTON, after stating the facts, delivered the opinion of the court.

1. Objection is made, through the interposition of a demurrer to the complaint, that several causes of suit have been improperly united, in that it states a cause of suit against Bissinger & Co., of Portland, and one against The Dalles National Bank, of The Dalles, and that neither of these parties has any interest in the cause stated against the other. Hence, it is claimed that the complaint is multifarious. Objections on account of multifariousness seem to be divided primarily into two classes: (1) Those which go to a misjoinder of two or more independent and incompatible causes of suit; and (2) where several matters of a distinct nature are stated and demanded against different parties. The two kinds of objections are well illustrated by Lord Chancellor COTTENHAM in *Campbell v. Mackay*, 1 Mylne & C. 603, wherein the distinction is clearly stated. He says: "Frequently the objection raised, though termed 'multifariousness,' is in fact more properly misjoinder; that is to say, the cases or claims united in the bill are of so different a character that the court will not permit them to be liti-

gated in one record. It may be that the plaintiffs and defendants are parties to the whole of the transactions which form the subject of the suit, and nevertheless those transactions may be so dissimilar that the court will not allow them to be joined together, but will require distinct records. But what is more familiarly understood by the term 'multifariousness,' as applied to a bill, is where a party is able to say he is brought as a defendant upon a record, with a large portion of which, and of the case made by which, he has no connection whatever." See, also, *Gartland v. Dunn*, 11 Ark. 720. It is said in *Alexander v. Alexander*, 85 Va. 353, 363 (7 S. E. 335, 339, 1 L. R. A. 125, 127), "that a bill will always be deemed multifarious where several matters joined in the bill against one defendant are so entirely distinct and independent of each other that the defendant will be compelled to unite in his answer and defense different matters wholly unconnected with each other, and as a consequence the proofs applicable to each would be apt to be confounded with each other, and great delays might be occasioned respecting matters ripe for hearing by waiting for proofs as to some other matter not ready for hearing; or, again, where there is a demand of several matters of a distinct and independent nature in the same bill, rendering the proceeding oppressive because it would tend to load each defendant with an unnecessary burden of costs, by swelling the pleadings with the statement of the several claims of the other defendants, with which he has no connection." A cardinal evil which the objection is designed to obviate is that of putting the parties to great and useless expense, and this has relation as it may affect either party to the suit. In *Attorney-General v. Cradock*, 3 Mylne & C. 85, it was said: "The object of the rule against multifariousness is to protect a defendant from unnecessary expense, but it would be a great perversion

of that rule if it were to impose upon the plaintiffs and all the other defendants the expenses of two suits instead of one."

It is here insisted that by suing Bissinger & Co. in Portland, and making The Dalles National Bank, and the other defendants residing at The Cascades and The Dalles, parties, and causing them to make their defenses in Portland, the plaintiff is putting them to an unwarranted and needless expense. No doubt, it has been more expensive for them to litigate in Portland than it would have been at The Dalles, and this emphasizes the pertinency of the reason assigned for the objection. The difficulty of laying down any rule of universal application, as it respects the subject of multifariousness, is suggested by many of the authorities. The cases upon the subject are extremely various, and the courts in deciding them, seem to have considered "what was convenient in particular circumstances, rather than to have attempted to lay down any absolute rule:" *Gartland v. Dunn*, 11 Ark. 720. The objection does not go to the merits of the cause, but relates more nearly to a question of convenience in conducting the suit; and, in a large measure, it simply calls for an exercise of discretion in deciding whether both or all the causes of suit set forth in the bill shall be tried in a single suit, or be split up, and the parties relegated to the bringing of two or more suits for the accomplishment of their purposes, or whether a defendant who is a necessary party in respect of one or more matters suggested by the complaint has a sufficient interest in or connection with the other matters involved to make him a proper party in respect to such other matters: *Bolles v. Bolles*, 44 N. J. Eq. 385 (14 Atl. 593). Mr. Justice DEPEW, in *Lehigh Val. R. R. Co. v. McFarlan*, 31 N. J. Eq. 706, 758, says: "The rule with regard to multifariousness, whether arising from the misjoinder of causes

of action or of defendants therein, is not an inflexible rule of practice or procedure, but is a rule founded in general convenience, which rests upon a consideration of what will best promote the administration of justice without multiplying unnecessary litigation, on the one hand, or drawing suitors into needless and unnecessary expenses, on the other." See, also, *Stevens v. Bosch*, 54 N. J. Eq. 59 (33 Atl. 293). Upon the whole, it would seem that each case must be examined with reference to its own particular and peculiar features; and, "much," as Mr. Justice STORY remarks in *Oliver v. Piatt*, 44 U. S. (3 How.) 333, 412, "must necessarily be left—where the authorities leave it—to the sound discretion of the court." See, also, *Gaines v. Chew*, 43 U. S. (2 How.) 619; *Barney v. Latham*, 103 U. S. 205, 215; *United States v. Union Pac. R. R. Co.* 98 U. S. 569, 604.

2. When the whole case is considered, it can hardly be said that the defendant The Dalles National Bank has been brought up on a record "with a large portion of which, and the case made by which, it has no connection whatever:" *Campbell v. Mackay*, 1 Mylne & C. 603. It is very apparent that it has no connection with a portion thereof, as the purchase of the duebills by Bissinger & Co. is a different transaction from that which the defendant The Dalles National Bank must necessarily prove in order to establish the *bona fides* of its purchase from Keller. But it is only at the point where the bills were hypothecated that the interest of the parties diverges, in so far as the nature of the proof is concerned. They had their origin in one and the same transaction, and whatsoever of fraud there is, or may have been, attending the issuance and procurement of the one set, the other series is subject to the like objection. In short, the history of each of said series of duebills is one and the same up to the time of their hypothecation to different persons; and

the ultimate question with which we have to deal is whether the cause should be dismissed because the attempt has been made to secure a decree touching all these bills in one suit, while the ownership of all is not in one and the same party. It is very apparent that both these defendants have direct and uniform connection with the whole record, barring the one exception named. Even a technical adherence to Lord Cottenham's second rule would not seem to require a dismissal. But, however that may be, the interests of the defendants The Dalles National Bank and Bissinger & Co. are not so diverse and disconnected, and the expenses of this proceeding so excessive, as to require separate suits. The demurrer for multifariousness does not go to the merits of the controversy, but calls upon the plaintiff to go out of court, split up his demands, and begin anew. It is the policy of the law that every case should be speedily tried upon its merits, whenever it can be without violation of positive and well-established rules which must be observed, to the end that the law itself shall be certain and of uniform application. To put the plaintiff out of court could not better subserve the ends of justice than to determine the whole controversy now. So the demurrer, as it regards the question here stated, will be overruled.

3. The defendant The Dalles National Bank controverts the right of the plaintiff to maintain a suit in equity, because, it is argued, plaintiff has a plain, speedy and adequate remedy at law for damages upon an action for deceit, it not having been alleged or proved that the defendant Keller was insolvent. Equitable jurisdiction is invoked upon the ground that a fraud has been practiced upon the plaintiff in procuring from him the due-bills in question. All the parties who were in any way interested in the transaction which gave utterance or existence to them are made parties, and were before the

court below, so that all matters pertaining thereto were capable of adjudication between them, and in that forum. In many cases founded upon fraud, equity and law have concurrent jurisdiction; and it is said that, where the primary right, interest or estate is legal, and the remedy sought is equitable, the latter jurisdiction exists, but will not be exercised where the legal remedy is plain, adequate and complete: 2 Pomeroy, Eq. Jur. (2 ed.) § 911; 8 Am. & Eng. Enc. Law (1 ed.), 651. The fundamental principle upon which is based the right to be remitted to a court of law is the constitutional right of a trial by jury. This is a sacred guaranty to every person whose privilege it is to apply to the tribunals of justice for relief from his grievances, and the courts are likewise bound to its faithful and punctilious observance: *Phipps v. Kelly*, 12 Or. 213 (6 Pac. 707); *Love v. Morrill*, 19 Or. 545 (24 Pac. 916); *Grand Chute v. Winegar*, 82 U. S. (15 Wall.) 373. But, unless his remedy at law is as adequate and complete as that which equity affords, it would be contrary to the plainest dictates of justice to require a resort thereto; nor was it the purpose of such constitutional guaranty to cut off or circumscribe a more speedy and adequate relief. The rule goes yet further: "The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would afford under the same circumstances:" *Gormley v. Clark*, 134 U. S. 338, 349, (10 Sup. Ct. 554, 557); *South Port. Land Co. v. Munger*, 36 Or. 457 (60 Pac. 5).

True, the plaintiff has a remedy at law against Keller for deceit, but he has also a remedy in equity, and the question is whether the former can afford plaintiff as effectual relief as the latter. The purpose of this suit is to recover possession and procure a cancellation of the due-

bills which, it is alleged, were obtained by the fraud of defendant Keller. The complaint proceeds upon the theory that these bills have not yet been paid by the makers, and that the parties into whose hands they have come acquired them with notice of the fraud, and the equities existing in favor of the plaintiff. It may be said that the initial purpose of the suit is to arrest the intended injury and to prevent an injustice being done, by laying hold of the duebills themselves and requiring their cancellation, and thus restoring plaintiff to the condition in which he was prior to the obtainment thereof from his debtors. The suggestion that the duebills were not the obligations of plaintiff does not alter the case, as they were obtained through fraudulent practices, and the amount of the debt represented thereby was canceled in such a way that he could not have relief against his creditor, the Columbia Packing Co. The plaintiff has been wronged, and the defendant Keller was the primary cause of that wrong; and this suit is now brought to avert the consummation of the scheme, by having the evidence of indebtedness canceled, and plaintiff reinstated as a creditor of J. G. & I. N. Day, and thereby place him in the position in which he stood before the consummation of the fraud. "If an instrument ought not to be used or enforced, it is against conscience for the party holding it to retain it, since he can only retain it for some sinister purpose:" 2 Story, Eq. Jur. (13 ed.) § 700. It seems to us that the case comes very clearly within the cognizance of equity, and that, while the plaintiff may have his remedy against Keller for damages, yet he must submit to the payment of those fraudulent duebills by his debtors, and waive his right to have them canceled, and the money, which J. G. & I. N. Day are ready and willing to pay when the controversy is at an end, placed to his credit. He can have no relief at law so adequate as this.

We come now to the question whether, and to what extent, the bank is a *bona fide* holder for value of the duebills in controversy. In view of the conclusion we have reached upon this part of the case, it may be conceded that these bills are negotiable, in a commercial sense, and that the bank should be protected to the full measure or extent in which it is entitled to be denominated or considered a *bona fide* holder. Preliminarily, it is suggested that, as the burden of proof rests with the plaintiff to show that the bank is not a *bona fide* holder for value, the allegations of the complaint are insufficient to support proof to that purpose. The allegations are, in substance, that Keller indorsed the duebills, and delivered the same to said Dalles National Bank; that said transaction between Keller and the bank was not a sale of said duebills; that said bank claims some interest therein, but refuses to state what the nature of its interest is; that said interest, if any, is subject to the plaintiff's rights and equities in the same; and that "said bank took and received said duebills with full notice and knowledge of plaintiff's rights and equities therein." We think these allegations are quite sufficient to let in the proof. Plaintiff was uninformed as to the particular and specific nature of the bank's holding, and proceeded somewhat in the way of a discovery; but, when he shows that the bank took and received the paper with full notice and knowledge of his equities, he has done all that is required to support proof to that purpose.

That the bills were fraudulently procured by Keller from Benson and the Days, and without authority from the packing company, is but little controverted. Keller was the chief factor in procuring the document of December 7, 1894, purporting to have been executed by the Columbia Packing Co., and his real purpose seems not to have been disclosed to any other stockholder or director

of the company. An inherent infirmity in the document is that it never became the contract or agreement of the company, by reason of the fact that it was never authorized or properly executed by that concern. At the date of its purported signing, A. A. Bonney was the president of the company, George Keller secretary, and Ed. Phirman treasurer, and these three were its only stockholders and directors. After reading the agreement, Bonney flatly refused to have anything to do with the meeting, or to consent, as a director, to the terms and conditions thereof; assigning as a very sufficient reason that it was not fair to the creditors of the company to thus impair the capital invested. Failing to get Bonney's assent to hold the meeting, Keller applied to Rice, who then held Bonney's stock in pledge, but he likewise refused to participate therein. Resort was then had to the expedient of appointing Guthrie president *pro tem.*, who was not the owner of any stock in the concern, had never been elected a director, and was entirely and absolutely unauthorized to act in such a capacity. The appointment was made by Keller alone; for Phirman, as it appears to us from the weight of the evidence, did not participate in the meeting. Thereupon these two (Guthrie and Keller) went through the form of adopting and executing the contract as and for the act and deed of the corporation,—Guthrie signing it as president; and Keller, without designating his official capacity or attaching the corporate seal, which was, however, subsequently attached. Whatever general authority Keller may have had to execute contracts as an officer of the corporation (and he had absolutely none in this instance, as shown by the records), Guthrie was without color or semblance of authority to participate in the meeting, or to sign as president *pro tem.* If it should be conceded that he was a stockholder,

he had never been chosen or elected a director, and he could not lawfully participate in a directors' meeting,—much less, act as president of the board.

Beyond this feature of the controversy, the contract itself does not purport to transfer or set apart from the whole to Keller any definite or certain accounts. The stipulation is that it will transfer of the remainder of the accounts, to wit, \$11,657.42,—one-third, to wit, \$3,885, to said George Keller. There was no segregation of the one-third, or setting the same apart to Keller; so that the contract, supposing it to have validity, constituted only an agreement to transfer a one-third interest, not that such interest had been segregated from the whole and transferred. Nor does the agreement authorize Keller to collect either upon his individual account, or on behalf of the company. Mr. Keller must therefore look elsewhere for his authority to collect from Benson and pay himself. His duties in connection with the business of the company furnished no warrant for his action. Bonney and Phirman were the business managers,—more, however, by common consent than by any direct authority to that purpose. They did the collecting and handling of the funds, drew checks against them, and transacted all matters of business incidental to the purposes for which the corporation was maintained. Keller was never permitted to draw any checks on account of the company; nor did he ever collect any of its accounts prior to the time he assumed to collect from Benson, except on one occasion, and that was to collect some local bills when sent out for the purpose by Phirman. Keller claimed, however, that Phirman gave him permission to collect from Benson, and to apply the funds collected upon his one-third interest in the accounts. He relates that he talked with Phirman respecting the company's accepting J. G. & I. N. Day's checks in payment of the

Benson account; that Phirman said the company did not care to assume the risk, but that if he (Keller) would take them, give credit for them, and assume the risk of their payment, it would be satisfactory to him and the company. But as to this Phirman positively contradicts Keller, and says that he never gave his permission to Keller to make the exchange, nor did he ever suffer or permit Keller to collect for the company but on the one occasion above referred to. This statement of Keller's is also inconsistent with the receipt he gave to Benson at the time he arranged for the duebills. The document is not in evidence, but Mr. Wilson gives its substance; and, among other things, it provides that Keller was to procure credit for Benson on the books of the Columbia Packing Co. for the amount of the exchange of credit, and to furnish a receipt or evidence of such credit before obtaining the paper. These circumstances, and others that might be recited, disprove Keller's assertion that he had Phirman's permission to make the collection by way of an exchange of credit or otherwise. Keller represented to Benson that he had full right and authority from the company to make the exchange of credit in the manner in which he attempted to secure it, going so far as to show him the spurious contract with the company of December 7; and Benson, relying upon these representations and the assurances that Keller would procure him credit upon the books of the company for the amount of the duebills, and his release from liability to that extent, made the exchange, neither of which did he attempt to have done.

It is further insisted that, immediately after Keller had secured the duebills, he brought them to the attention of the company, and that it ratified his acts. He says he showed the checks to Phirman on the evening he obtained them; that Phirman was satisfied with what

he had done, and placed them in the company's safe over night; that he subsequently related to Rice what he had done, and that Rice approved of the transaction; and that no objections were made by the directors to the exchange of credit until a much later period. This constitutes the basis for the alleged ratification. But the better evidence is against Mr. Keller again. Phirman and Rice both contradict him, and both say that they never saw or heard of the checks until notified of the fact of their issuance by Benson at a much later date; that they immediately denied the authority of Keller in the premises; and that the company never allowed Benson credit for the amount of the paper issued to Keller, although a settlement has been had between them. It cannot be said that Keller was authorized in any relation to procure the issuance of these duebills to himself, and thereby to withdraw from the company the equivalent of its assets. When the whole record is considered, this is very clear; but, owing to the large amount of testimony upon the subject, we are unable to give it more than cursory allusion. Being without right or authority to thus acquire the bills, the result is a palpable fraud upon the company, and they are clearly void in the hands of all holders thereof with notice of their infirmity.

4. The Dalles National Bank procured the series which it now holds some time before January 15, 1895,—the date upon which they fell due. Keller states that the transfer was made some time after the tenth, but before their maturity. The cashier of the bank does not fix the date definitely, but is sure that it was before maturity. The bank took them as collateral for future advances to be made from time to time as Keller might need the money. They were delivered to the bank by Keller, received by it, placed in an envelope, and deposited in its vault, with-

out giving Keller at the time any receipt therefor, or credit upon his account. From the stubs of checks it appears that Keller had been drawing against the bank since January 4, but at the date of the delivery of the bills to the bank it does not appear that Keller was in its debt in any sum. From the account introduced in evidence by the bank, it appears that on January 26 Keller deposited \$500; on the twentieth-eighth, \$225 more; and upon February 14 he had drawn against his credit to the amount of \$404.30, leaving a balance in his favor on the latter date of \$321.30. On February 16 he drew for \$89.50, and on the twentieth for \$75 additional. On January 19 the bank, by one of its officials, wrote J. G. & I. N. Day of its holdings; and on the twenty-first they notified it that Mr. J. G. Day would be in The Dalles in a few days, and would call upon it,—saying that their pay day had been unavoidably delayed. On February 11 they again wrote the bank, in answer to an inquiry: “We have been requested by the party in whose interest the drafts were drawn to withhold payment for a few days, pending the settlement of a dispute that has arisen between the parties. We will take the matter up to-morrow and write you further.” No other letter appears to have been received by them, however. On February 14 Benson went to The Dalles, and, after learning that the company would not credit him with the amount of the duebills, employed counsel to secure an adjustment. On the same day one of the counsel made a demand upon Keller for a return of the bills, tendering him the receipt which he had given to Benson. He having refused, counsel, either on the next day or two days thereafter, made inquiry of the bank, and ascertained that it held some of the paper, whereupon he told the cashier that the duebills had been obtained from J. G. & I. N. Day, or from Benson through J. G. & I. N. Day, by fraudulent representations, and

that proceedings would be instituted at once to secure their return and cancellation. This suit was instituted and the bank served with summons April 5 following. In the meantime, inclusive of the fifth, Keller had by overdrafts become indebted to the bank in the sum of \$746.98, and upon that day gave his note thereto for \$1,000, and obtained credit for that sum upon his account. Keller's account was subsequently continued, he depositing and drawing as occasion demanded. On February 1, 1896, he executed another note to the bank for \$500, and obtained a like credit upon its books; but he had drawn against it and the former note to their full limit, and the bank now claims to hold the Day checks or duebills as collateral for the payment of the said two notes.

The plaintiff protests that the bank is not, under the conditions attending the transaction, a purchaser thereof for value. The letters from J. G. & I. N. Day written to it, and the notification by plaintiff's counsel that the duebills had been obtained through fraudulent representations, and that suit would be instituted to recover them, were undeniably sufficient to give the bank notice of the infirmity attending them; and more especially is this so as they were at the time overdue and unpaid. The letter was written only a few days prior to the date when counsel advised the bank, on the part of the plaintiff, that the duebills had been fraudulently issued; and at that time Keller was not a debtor, but a creditor, of the bank, and they were not then held as collateral for any sum whatever. Any amounts advanced upon the credit of this paper were subsequently made. The bank is not, therefore, in the position of an innocent holder for value. True, the transfer and arrangement with Keller whereby he was to have advances upon the paper were made before maturity; but no such advances were made until after the

bank had been apprised of the infirmity, and the paper was long overdue. In *Dresser v. Missouri, etc. Const. Co.* 93 U. S. 92, an action was brought upon several promissory notes, to which the defense was interposed that they had been fraudulently procured. The plaintiff claims to have purchased the notes upon a verbal agreement that the money should be paid therefor as it should be required, but he gave no note or other obligation which might have, by its transfer, subjected him to liability. Five hundred dollars was paid before the notice of the fraud was brought home to him, and the balance agreed upon subsequently. The lower court instructed the jury "that if the fact of fraud be established, and the jury find from the evidence that the plaintiff paid \$500 upon the notes without notice of the fraud, and that after receiving notice of the fraud he paid the balance due upon the notes, he is protected only *pro tanto*; that is, to the amount paid before he received notice." This instruction was approved by the supreme court on appeal; the court, speaking through Mr. Justice HUNT, saying: "The notes in question were purchased upon an unexecuted contract, upon which \$500 only had been paid when notice of the fraud, and a prohibition to pay, was received by the purchaser. The residue of the contract on the part of the purchaser is unperformed, and honesty and fair dealing require that he should not perform it; certainly, that he should not be permitted, by performing it, to obtain from the defendants money which they ought not to pay. As to what he pays after notice, he is not a purchaser in good faith. He then pays with knowledge of the fraud, to which he becomes a consenting party. One who pays with knowledge of a fraud is in no better position than if he had not paid at all. He has no greater equity, and receives no greater protection. Such is the rule as to contracts generally. * * * Upon receiving

notice of the fraud, his duty was to refuse further payment, and the facts before us require such refusal by him."

The case at bar is even stronger, as that was a purchase, and the contract executory. This is not a purchase, but a pledge of collateral to secure future advances. Whenever it became known that the paper had been fraudulently obtained, then the bank was under no further legal obligation, as between it and Keller, to make advances upon its credit. The bank negotiated with the idea that Keller was pledging good paper, and it was only required to make or continue advances upon the very quality of security for which it had contracted. But as soon as it was made aware of the fact that the paper was not such as it had stipulated for, but had been obtained through fraud and deceit, at that moment it was released of its obligation to Keller, and was not bound, under its agreement with him, to make or continue the advances. Being thereby released of its obligations to Keller, advances subsequent to the notice were at its peril; and, the infirmity being established, its position entitles it to no greater protection than those who were parties to the original transaction: *Texas Banking & Ins. Co. v. Turnley*, 61 Tex. 365, is a case of some analogy to the present. The husband pledged certain railroad bonds, the property of his wife, as security for such sums as he might then or thereafter owe the bank. The action was to recover the value of the bonds, upon the ground that they were hypothecated without the authority of the wife. It was not shown that the bank had notice of the infirmity of the husband's title at the time the bonds were received as collateral, but, because it did not appear that the bank had advanced any money upon the faith of the bonds prior to their maturity, it was held that the bank was not a *bona fide* holder, and was therefore liable to account for their value; thus promulgating the principle

that, where negotiable securities are taken as collateral for future advances, and none are made until after the securities have matured, as to such advances the holder cannot maintain that he is a purchaser for value, without notice of infirmity. We are not called upon to go as far as that, but the case is cited as illustrative and in re-enforcement of the principle which governs here. We hold that, where negotiable paper is taken before due, as collateral for future advances, but none are made until after its maturity, the holder having notice in the meanwhile of its infirmity, such holder does not occupy the position of a purchaser for value, and will not be protected as against the party defrauded.

5. It is urged that, as Mr. Benson was not a party to the paper, whatever notice he may have imparted to the bank did not bind it, and that it was not required to give credence to the representations and demands of a mere stranger. But the bank had prior notice from the makers of the duebills that all was not right; and the positive statement of Benson's counsel that they had been obtained through fraudulent representations, and that suit would be instituted at once to recover them, was sufficient to signify to the bank that he spoke with a degree of authority, requiring inquiry and investigation. It is also suggested that suit was not brought at once, but was delayed for nearly two months. But this did not change the condition that the bank was dealing with overdue paper, having an infirmity, with notice of such infirmity. These considerations affirm the decree of the court below, and it is so ordered.

AFFIRMED.

Decided 26 March, 1900.

HENDERSON v. HENDERSON.

[48 L. R. A. 766, 60 Pac. 597, 61 Pac. 138.]

DIVORCE—POWER TO MODIFY DECREE AS TO MAINTENANCE.

1. Under Hill's Ann. Laws, § 501, subds. 3 and 5, authorizing the court upon entering a decree of divorce to award against the party at fault an appropriate amount for the maintenance of the other, and section 502, authorizing the court on motion to set aside, alter or modify so much of a divorce decree as may have provided for the maintenance of either party, a divorce is not final nor *res judicata* between the parties as to such matters: *Corder v. Speake*, 37 Or. 106, followed.

HUSBAND AND WIFE—SEPARATION AGREEMENT—PUBLIC POLICY.*

2. A contract by which a husband agrees to pay certain moneys to his wife for her support for a stated period, not made for the purpose of securing a separation, but in contemplation of a divorce on account of the misconduct or disability of the husband, and without fault or inducement by the wife, is not void on grounds of public policy.

HUSBAND AND WIFE—MODIFICATION OF SEPARATION AGREEMENT.

3. A decree carrying into effect the terms of an agreement between husband and wife by which the latter is to receive a certain sum per month for her support during her life after a divorce caused by the husband's misconduct, cannot afterward be modified by the court without the consent of both parties thereto.

UNDERTAKING ON APPEAL—EFFECT OF STIPULATION.

4. On appeal from an order dismissing with costs a motion for modification of a decree granting a divorce and alimony, defendant gave a bond to the effect to satisfy the order appealed from so far as affirmed. About the same time a stipulation was filed providing that, in consideration that plaintiff would not file any counter bond, as provided by Hill's Ann. Laws, § 540, in order that she might enforce the decree for alimony pending the appeal, the defendant would pay her a certain sum per month until the appeal was determined, to be applied *pro tanto* in payment of any alimony to which plaintiff should be entitled on the final determination of the suit. *Held*, that the stipulation did not enlarge the scope of the appeal bond, so as to render the surety liable for alimony which accrued against defendant after the appeal was perfected.

From Multnomah: JOHN B. CLELAND, Judge.

This is an application by M. W. Henderson for a modification of a decree of divorce rendered against him and in favor of Ellen Henderson. On February 4, 1894, the plaintiff was granted a divorce from the defendant, and

*NOTE.—See 4 L. R. A. 313 for note, Collusive Agreement Between Husband and Wife in Aid of Divorce Proceedings.—REPORTER.

37	141
137	184
37	141
40	484
37	141
44	318
37	141
47	616

in the decree therefor the defendant, among other things, was required to support and educate the minor child of the parties during his minority, and to pay to plaintiff during the term of her natural life the sum of \$150 per month. On January 6, 1897, defendant petitioned the court in which such decree was rendered to modify the same so that he should be required to pay the plaintiff only \$75 per month, alleging as reasons therefor that his business and property, and the income therefrom, had so decreased that he was no longer able to meet and pay the sum decreed, or any greater amount than \$75 per month; that the plaintiff did not require, nor did she expend, more than that sum for her support, but had spent the remainder for purposes not beneficial to her. The plaintiff answered that defendant ought to be estopped from setting up that she did not require more than \$75 per month of the sum decreed, or that, by reason of adverse fortune, he is now unable to pay more, or to allege any matter whatsoever as a reason for a modification of the decree in the respect prayed for, for the reason that plaintiff and defendant, on or about January 15, 1894, made and entered into a postnuptial agreement settling and adjusting as between themselves their property rights, under and by the terms of which, among other things, the defendant, for himself, his heirs, executors and administrators, in consideration of plaintiff's covenants, did covenant and agree to pay through the First National Bank, of Portland, Oregon, to the plaintiff, or order, the sum of \$150 on the fifteenth day of each month thereafter during the term of her natural life; that, as security for the payment of the same for the term of ten years from said date, the defendant agreed to join with the plaintiff in deeding block 22, in McMillen's Addition to the City of East Portland, Oregon, to one Byron Z. Holmes, to be held by him in trust as security

for the payment of said allowance for the term aforesaid ; and it was further agreed that, in case the defendant should desire to sell or dispose of said property, then said Holmes was to furnish plaintiff good and sufficient surety for the payment of said allowance for the balance of said term, or invest the proceeds of the sale in a manner satisfactory to the attorneys for plaintiff and himself, and thereafter to hold said new investment as security for the payment of said allowance ; that it was mutually agreed between the parties to said agreement that said property was not to be sold or disposed of for less than the amount required to pay the stipulated allowance until the expiration of the ten years ; that the plaintiff, in consideration of said covenants and agreements, relinquished all her right and interest in and to the property of defendant, both real and personal, of every name, nature and description whatsoever, and it was therein specially agreed that the defendant would properly clothe, maintain and educate the said minor child of said parties ; that said agreement was signed and delivered by the parties thereto, and thereupon, and contemporaneously with the execution thereof, the plaintiff and defendant did duly make, execute and deliver a warranty deed for said block to the said Byron Z. Holmes, who accepted said trust, and thereupon, as a part of the same transaction, Holmes entered into separate contracts with plaintiff and defendant, wherein he agreed to carry out and fulfill all of the covenants and terms of said agreement between plaintiff and defendant, and fully to carry out the trust imposed upon him ; that at the time the first agreement referred to was made and entered into between plaintiff and defendant they were husband and wife ; that said agreement was made for a valuable consideration, in order to adjust and settle the property rights between them, and to provide for the support and

maintenance of plaintiff and the support and education of the minor child; that the terms of said agreement and the provisions for support therein contained were reasonable and just; that the agreement is in full force and effect, and all the terms and conditions thereof have been fully complied with by plaintiff; that the deed to Holmes was made in pursuance of said agreement, as well as with declarations of trust respecting the property; that thereafter the court rendered the said decree of February 4, 1894; and that the amount of alimony agreed upon between them in the adjustment of their property rights was embodied therein, and that the defendant has complied with the terms of said agreement up to the fifteenth day of September, 1897, but since then has wholly disregarded them. A demurrer interposed to this defense being overruled, a reply was filed, denying the estoppel only, and further alleging that the tendency of said agreement between the plaintiff and defendant was to interest the defendant in foregoing resistance to the suit of plaintiff against the defendant then pending for a dissolution of the bonds of matrimony between them, and that said agreement is contrary to public policy, and void. Thereupon a motion was filed by plaintiff for a decree upon the pleadings, which being allowed and the petition dismissed, the defendant appeals.

AFFIRMED.

For appellant there was a brief over the name of *Stott, Boise & Stout*, with an oral argument by *Mr. Whitney Lyon Boise*.

For respondent there was a brief over the names of *Charles J. Schnabel* and *Chamberlain & Thomas*, with an oral argument by *Mr. Schnabel* and *Mr. Geo. E. Chamberlain*.

MR. CHIEF JUSTICE WOLVERTON, after stating the facts, delivered the opinion of the court.

We are now to determine whether the facts set up by the answer to the defendant's petition constitute a defense to a modification of the decree in so far as it provides for the maintenance of the divorced wife. The facts relied upon are set forth by way of estoppel to the defendant insisting upon the modification, it being urged that a valid and binding agreement, based upon a sufficient consideration, was entered into by and between the parties, and that, the decree having been given and rendered in pursuance thereof, neither party can now be heard, without the consent of the other, to deny its validity or binding force and effect.

1. It is suggested, but not urged with great confidence, that a decree of divorce whereby provision is made for the maintenance of one party by the other is final; that all matters determined thereby have become *res adjudicata*, and cannot subsequently be questioned or modified. Such decrees are generally regarded as final, unless reservation has been made in the decree for further adjudication and determination, or the statute has made appropriate provision for such further action. No reservation was made by the decree itself in the case at bar, but the statute has made provision to the effect that, whenever a marriage shall be declared void or dissolved, the court shall have power to further decree, among other things, for the recovery of and from the party in fault such an amount of money in gross or in installments as may be just and proper for such party to contribute to the maintenance of the other, and for the appointment of one or more trustees to manage in such manner as the court shall direct any sum of money decreed for the maintenance of the wife, and that at any time after a decree

is given the court or judge thereof, upon the motion of the other party, shall have power to set aside, alter, or modify so much thereof as may provide for the appointment of trustees for the care and custody of the minor children, or their nurture and education, or the maintenance of either party to the suit: Hill's Ann. Laws, § 501, subdivisions 3, 5; and section 502. Mr. Justice MOORE, speaking of section 502 (in *Corder v. Speake*, 37 Or. 105, 51 Pac. 647), says: "The statute authorizes the court, upon motion, to set aside, alter, or modify so much of a decree of divorce as relates to the maintenance of either party to the suit." This language is explicit, and is a rational and just interpretation of the statute; and, were it not for the contention of counsel that the question was not involved in that case, we should make no further comment. True, the provisions of the section are somewhat vague, but, when read in *pari materia*, as it should be, with the preceding section, it is manifest that the legislative intendment was to authorize a modification in that particular. Hill's Ann. Laws, § 501, subd. 1, provides for the care and custody of the minor children; subdivision 2 for the recovery of the party in fault, and not allowed the care and custody of the children, such an amount of money as may seem proper for such party to contribute towards their nurture and education; and then follow the provisions to which allusion has already been made, touching the maintenance of the party not in fault, and the appointment of trustees for the management of such sums as shall be decreed for the maintenance of the wife, or the nurture and education of the children committed to her care and custody. The modification contemplated comprises the subject-matter of these several subdivisions, respecting which the court is empowered to enter its decree in the first instance, and may be tersely enumerated (1) as it respects the appointment of trustees

for the care and custody of the minor children, (2) as it respects the nurture and education thereof, and (3) as it pertains to the maintenance of either party to the suit. This latter provision plainly refers to subdivision 3 of the preceding section, whereby it is provided for the recovery of the party in fault of such an amount of money as may be proper for such party to contribute towards the maintenance of the other, and this comprehends the wife in the case at bar. Such is the construction usually accorded the latter section in the practice, and is, we are convinced, within the legitimate purpose and intendment of the legislature.

The maintenance provided for by statute is an enlargement upon the signification of the term "alimony" as used in the parlance of the common law. Alimony is an allowance which, by order of the court, the husband is compelled to pay the wife from the date he has been legally separated or divorced, for her support and maintenance. This is to be distinguished, in a general sense, from an allowance *pendente lite*, and proceeded from the recognition of the husband's common-law liability to support the wife: 2 Am. & Eng. Enc. Law (2 ed.), 92. But the statute contemplates an allowance out of the wife's estate in favor of the husband also, thereby extending the power to make an allowance in divorce proceedings; and the authority to modify the decree subsequent to the time of its rendition in respect to maintenance exists as well in the one case as the other,—that is to say, whether the allowance is made from the husband's estate for the maintenance of the wife, or *vice versa*. Although the right to have an allowance awarded for maintenance has been extended by the statute to the husband, the same reasons do not exist in support thereof which formerly induced the allowance of alimony proper. His right thereto is merely statutory, and, while her right is now sustained

by the same authority, the statute is, as to her, declarative of that which formerly existed through usage and custom in so much that it had become the unwritten law. At common law the measure of the allowance was determined by the husband's "faculties," and this because of obligations growing out of the marriage relations to support his wife and offspring. But the rule which should regulate the measure of an allowance to the husband must stand upon an entirely different footing. Whatever that may be, it is unnecessary for us to discuss at this time. The more recent legislation has tended strongly to the removal of all disabilities of the wife which do not exist as to the husband, and she may now contract and incur liabilities and responsibilities to the same extent and in the same manner as if she were unmarried: Hill's Ann. Laws, § 2997. While this fact should not detract from the reasons which support an allowance for her benefit, yet it is a strong circumstance tending to the support of her contracts relative to her maintenance made with her husband, who has always been accounted *sui juris*.

2. It is urged that the contract in controversy is against public policy, and void. But this can hardly be said of it when examined in the light of adjudications uniformly adhered to for a long period of time. In *Walker v. Walker*, 76 U. S. (9 Wall.) 743, where the validity of a deed of separation between the husband and wife was called in question because it was thought to have been executed contrary to public policy, it was held to be valid, the consideration being apparent, and that it would be enforced in equity if it appeared that it was not made in contemplation of a future possible separation; but in respect to one which was to occur immediately, or for the continuance of one that had already taken place, especially was it said to be true if the separation was occasioned by the misconduct of the husband, and the provision for the

wife's support was reasonable under the circumstances, and no more than the court would award for her as alimony should she seek such a remedy for her grievances. When the separation exists as a fact, and is not induced or occasioned by the agreement, the consideration for the husband's undertaking to pay alimony is his release from liability for the support of his wife: *Roll v. Roll*, 51 Minn. 353 (53 N. W. 716); *Pettit v. Pettit*, 107 N. Y. 677, 679 (14 N. E. 500). It may be stated, generally, that any contract or agreement between husband and wife, which, by its terms or effect, is conducive to a relaxation or a severance of the marital ties, is void, as contrary to public policy, and will not be upheld or maintained. But where a separation has been induced, not by collusion, but by the vicious conduct or disability of one of the parties, without inducement or fault of the other, and it has furnished just grounds for legal separation, then a contract looking to a settlement of property rights and the proper maintenance of the one not in fault is in no sense repugnant to public policy: *Randall v. Randall*, 37 Mich. 563.

3. In Wisconsin it has been determined, in effect, under a statute authorizing the court from time to time, upon petition of either of the parties, to revise and alter the decree as it may respect alimony or an allowance for the wife and children, that, notwithstanding the parties may have entered into an agreement anterior to the decree touching the amount of such alimony, the terms of which were incorporated in the decree, yet that the court was authorized to subsequently modify the allowance: *Blake v. Blake*, 68 Wis. 303 (32 N. W. 48); *Blake v. Blake*, 75 Wis. 339 (43 N. W. 144). The strong tendency of adjudications elsewhere, however, establishes a contrary doctrine,—that when parties have agreed between themselves touching the allowance, and the same is reasonable, and such as ought to be granted under the circumstances

and conditions attending the divorce proceedings, having in view the station and capabilities of the parties to respond, and not being contrary to the policy of the law, such an agreement, subject to the approval of the court, is binding upon the parties thereto. In *Calame v. Calame*, 25 N. J. Eq. 548, the husband had deserted his wife, and while he was living in a state of willful estrangement from her he offered in writing to turn over to her certain lands, and to pay her a sum of money, which she accepted in writing. The court, in subsequently granting the wife a divorce, further decreed that she was entitled to the lands and money agreed upon. Under the statute of New Jersey, alimony could not be given in gross, nor in a portion of the real estate of the husband. It was held, however, notwithstanding the court could not enforce an agreement as between the parties to live apart, yet that it could and would enforce an agreement, in a proper case, for the payment of the sum intended for separate maintenance according to the stipulations, and this without the intervention of a trustee, although the husband and wife could not ordinarily enter into a binding contract with each other. Mr. Chief Justice BEASLEY, in concluding his opinion, said: "My deduction from these principles and decisions is that it was within the competency of equity to enforce, as a part of the decree of divorce, the agreement made in lieu of alimony between the complainant and defendant. I do not mean, however, that every agreement which is thus made will be supported. The court should undoubtedly look into these arrangements and their surroundings; but when it appears that the separation of the wife, forming the groundwork of the agreement, was justifiable, and the provision is suitable, to this extent it is, in my judgment, safe to say that the contract should be upheld." In *Stokes v. Anderson*, 118 Ind. 533, 552 (21 N. E. 331, 338, 4 L. R. A. 313, 321),

it was said: "It may be that, if an action for divorce is pending, or if, in anticipation of such an action, the parties meet and agree upon the amount of alimony to be allowed to the wife in case a divorce is granted, and the arrangement is just and equitable, and confined strictly to the matter of alimony, it will be sustained. But if the agreement is broader in its terms, and its tendency is to interest the husband in procuring a divorce, or in foregoing resistance to an effort by his wife to that end, then it is contrary to public policy, and is void:" *Everhart v. Puckett*, 73 Ind. 409. See, also, *Dutton v. Dutton*, 30 Ind. 452.

In *Buck v. Buck*, 60 Ill. 241, a decree was granted the wife, reciting, among other things, that the husband was a man of large property; that, alimony having been settled between the parties upon the basis therein stated, it was accordingly decreed that the husband pay to the wife \$12,000, and the further sum of \$1,000, the value of certain furniture and silverware, and that he should maintain and educate an adopted child. The case went to the supreme court, and as a ground of reversal it was urged that the alimony allowed by the court was excessive and oppressive. But it was held that the husband, having consented to the provisions of the decree, should have no relief against his own voluntary agreement, the court saying: "Whether the alimony is too high, or whether the court had any lawful authority to make provision for the maintenance of the adopted daughter without the consent of the plaintiff in error, it is not now necessary for us to express an opinion. It was competent for the plaintiff in error to consent to such a decree, and, having done so, it must remain forever binding on him." So, in *Storey v. Storey*, 125 Ill. 608 (18 N. E. 329, 1 L. R. A. 320, 8 Am. St. Rep. 417), it was held that, "while it is true that husband and wife

cannot lawfully enter into an agreement for divorce, yet it is well settled that the amount of alimony which the husband is to pay to the wife, and the terms of the payment, and the length of time during which such payment is to continue, may be all arranged between them by consent." So a decree awarding alimony in gross or out of the husband's realty, based upon the agreement of the parties, even where the statutory provisions do not permit an allowance in that mode, has been upheld and enforced: *Crews v. Mooney*, 74 Mo. 26; *Russell v. Russell*, 4 G. Greene, 26 (61 Am. Dec. 112). As bearing upon the question, see, also, *Owen v. Yale*, 75 Mich. 256 (42 N. W. 817); *Petersine v. Thomas*, 28 Ohio St. 596; *Stratton v. Stratton*, 77 Me. 373 (52 Am. Rep. 779); *Morrison v. Morrison*, 49 N. H. 69. We conclude, therefore, in consonance with these latter authorities, that the better rule is that, notwithstanding the court has power and authority to modify its decree of divorce touching the awarding of a sum of money for the maintenance of either the husband or wife by the other subsequent to the entering of the decree, yet, nevertheless, they may agree in a proper case touching the amount of such sum and the manner of its payment, subject to the approval of the court as to its validity in good morals and as conformable to public policy, and in further consideration of the status and condition of the parties relating to the question of its fairness and equability of adjustment; but that, when such an agreement has been approved by the solemn decree of the court, it becomes forever binding, to the same degree and with like effect as ordinary contracts between parties admittedly *sui juris*, and is not subject to revocation or modification, except by the consent of the parties thereto. In this view the decree of the court below must be affirmed, and it is so ordered.

AFFIRMED.

Decided 28 May, 1900.

ON MOTION TO MODIFY MANDATE.

Messrs. Geo. E. Chamberlain and Chas. J. Schnabel, for the motion.

Mr. Raleigh Stott, contra.

PER CURIAM. 4. This is a motion to modify the decree rendered in this court in the above-entitled cause, so that it may be entered against the surety on the undertaking for appeal, not only for the costs and damages, but as well for the sum of \$1,800, the amount of alimony which has accrued against the defendant and appellant under the decree of the circuit court since the appeal was perfected.

The facts out of which the controversy arises are substantially as follows: The plaintiff recovered a decree of divorce against the defendant January 3, 1894, and, as a part of the same decree, the defendant was directed to pay her \$150 per month alimony. Subsequently the defendant moved for a modification of this decree, so as to relieve him from the payment of \$75 per month of such alimony, which resulted in an order or decree dismissing the motion, and adjudging that the defendant pay the costs attending the same, from which defendant prosecutes his appeal to this court. In perfecting his appeal defendant gave an undertaking, with Byron Z. Holmes as surety, to the effect that he would satisfy the decree appealed from so far as affirmed. Subsequent to the time when the appeal was perfected, there accrued against the defendant, and in favor of the plaintiff, the sum of \$1,800 alimony under the original decree entered when the divorce was granted; and the purpose of the motion now made is to have the decree of this court en-

tered against the surety upon the appeal bond for this latter sum, as well as for the costs attending the motion for a modification of such original decree. There was a stipulation filed in the court below about the time the appeal was perfected, which sets forth that "whereas, the undertaking on appeal in said cause provides for a stay of proceedings as well as for an appeal; and, whereas, the plaintiff intends, notwithstanding such appeal, to make and execute a counter bond as provided by Section 540, Hill's Ann. Laws, in order that, notwithstanding said appeal, she may enforce the original decree for alimony in said cause: Now, therefore, in consideration that the plaintiff will not execute and file any counter bond as provided by said section, it is stipulated and agreed by and between the parties hereto that, pending said appeal, and until the final determination thereof, the defendant will pay to the plaintiff the sum of seventy-five dollars (\$75) per month, promptly on the fifteenth day of each month from and after this date, and that execution may issue to enforce the payment of the same if not so paid; it being understood and agreed, however, that the said sum of seventy-five dollars (\$75) per month is not to be deemed or taken as a waiver of any portion of the alimony that may accrue under the terms of the original decree, and the said sum so received is only to be applied *pro tanto* in payment of any alimony to which the plaintiff may be entitled upon the final determination of said suit."

It is claimed for the respondent that this stipulation, taken in connection with the undertaking, shows that it was the purpose of the undertaking to cover the amount of alimony which should accrue under the decree of the circuit court after the date of the perfecting of the appeal to this court. But in this view we cannot concur. The appeal is from the decree of the circuit court dismissing

the motion for a modification of the original decree granting a divorce and alimony. It simply adjudges that the motion be dismissed, and that the plaintiff have and recover of and from the defendant her costs and disbursements therein, which has reference to the costs and disbursements attending the motion for modification. So that the undertaking is not broad enough to comprehend the initial decree of the court granting the divorce and giving alimony to the plaintiff, nor does the stipulation enlarge its scope, the evident purpose of which was to adjust the amount of alimony to be paid while the motion was pending and undecided, not to secure the payment thereof, or any part of it. The surety is therefore not bound for the payment of the accrued alimony by the terms of the undertaking, and the motion to modify the decree of this court will be denied.

MOTION OVERRULED.

Decided 18 June, 1900.

HERRON v. EAGLE MINING COMPANY.

[61 Pac. 417.]

INTEREST OF LOCATOR OF MINE—STATUTE OF LIMITATIONS.

1. The interest acquired by a locator in possession of a mining claim prior to his compliance with provisions of United States statutes entitling him to a patent is merely personalty, and not an interest in real property, from which it follows that the ten year limitation provided by Section 382, Hill's Ann. Laws, concerning suits for the determination of an interest in real property, does not apply to a suit for the specific performance of a contract to convey an unpatented mining claim: *Allen v. Dunlap*, 24 Or. at p. 234, and *Duffy v. Mix*, 24 Or. at p. 209, cited.

SPECIFIC PERFORMANCE—PLEADING.

2. Where the owner of lands was to convey an interest therein for services to be rendered by plaintiff, and the contract provided that the owner might sell the claim before the expiration of the work, no recovery could be had in a suit for specific performance against the owner's assignee, where there was no allegation that the lands were not so sold.

From Baker: **ROBERT EAKIN**, Judge.

Suit by Isaac Herron against the Eagle Mining Co. to enforce specific performance of a contract made with plaintiff by defendant's grantor. There was a decree for defendant, from which plaintiff appeals. **AFFIRMED.**

For appellant there was a brief over the names of *Olmstead & Miller* and *N. M. Ruick*, with an oral argument by *Mr. Martin L. Olmstead*.

For respondent there was a brief over the name of *Courtney & Knight*, with an oral argument by *Mr. N. B. Knight*.

MR. JUSTICE BEAN delivered the opinion of the court.

This is a suit for the specific performance of a contract. The facts are that in September, 1886, one Henry Cable, who was in possession as locator of a quartz mining claim in Baker County known as the "Grey Eagle," entered into a written contract with D. C. Probasco and A. H. Huntington, by the terms of which he agreed to sell and convey them an undivided two-thirds interest therein in consideration of their doing the annual assessment work for the four consecutive years beginning with 1886; it being stipulated, however, that in case the whole or any part of the claim should be sold or disposed of by Cable before the expiration of the four years, Probasco and Huntington should share in the proceeds, the same as though they were the legal and rightful owners of the two-thirds interest in the mine. Probasco and Huntington performed the assessment work for the years 1886 and 1887, when Probasco transferred to plaintiff all his rights under the contract, and the plaintiff and Huntington thereafter complied with its terms, so as to become entitled, on the first day of January, 1890, to a conveyance, as stipulated in the contract. About that time

Cable conveyed to Huntington an undivided one-third interest in the mine, but refused to make a conveyance to the plaintiff. The defendant corporation has been the owner of the mine since December 7, 1891, but purchased it with knowledge of the plaintiff's rights. This suit was commenced on December 20, 1899, whereupon the defendant interposed a demurrer to the complaint on the grounds that it appears upon the face thereof that the suit is barred by the statute of limitations, and that it does not state facts sufficient to constitute a cause of suit; which being sustained, and the suit dismissed, plaintiff appeals.

1. The contention for the plaintiff is that this is a suit for the determination of a claim to or interest in real property within the meaning of Section 382, Hill's Ann. Laws, and is, therefore, within the ten-years statute of limitations. The nature of the title or rights acquired or held by a locator in possession of a mining claim prior to his compliance with the provisions of the statutes of the United States entitling him to a patent is difficult to determine from the authorities. Prior to such compliance it is agreed he has an absolute right of possession. In many states this possessory right is by statute declared to be an interest in real estate, and subject to seizure and sale as such: *Barringer & A. Mines & Mining*, 317; 1 *Lindley, Mines*, § 535. And the decisions of the courts holding it to be real estate, are in most, if not all, instances based upon some such statutory provision. Prior to the law of 1898 (Laws, 1898, p. 16) we had no statute to that effect except Section 3830, Hill's Ann. Laws, which is not involved here. It was consequently held in *Duffy v. Mix*, 24 Or. 265 (33 Pac. 807), and *Allen v. Dunlap*, 24 Or. 229 (33 Pac. 675), that the locator of a quartz mine, prior to the time he becomes entitled to a patent, has a mere right of possession or possessory title, which is valuable, and will be protected by law, but is not real estate

or an interest in land. This view finds support in the decisions in California that prior to the act of 1860, providing for the conveyance of mining claims, they would pass by a verbal sale, if accompanied by an actual transfer of the possession of the ground, because the right to such claim rested on possession only, and did not amount to an interest in the land, and therefore not within the statute of frauds: *Patterson v. Keystone Mining Co.* 30 Cal. 360; *Table Mountain Tunnel Co. v. Stranahan*, 20 Cal. 198. In accordance with the doctrine adopted by this court, the demurrer must be sustained on the ground that the suit was barred by the statute of limitations.

2. There is, however, another ground for supporting the decree of the court below. The contract between Cable and the plaintiff's assignor manifestly contemplated that Cable should have the right to sell and dispose of the mine at any time before the completion of the assessment work, and there is no allegation in the complaint negating such sale or disposition. The decree of the court below will therefore be affirmed, and it is so ordered.

AFFIRMED.

Decided 11 June, 1900.

TURNER v. LOCY.

[61 Pac. 342.]

MINING CLAIM—NUISANCE BY BACKING WATER.

1. A dam across a nonnavigable stream, whereby debris from the mines of an upper proprietor is arrested, does not constitute a private nuisance, entitling the upper proprietor to abate it, unless the dam backs the water on the upper proprietor's premises, causing him such injury that he can maintain an action therefor.

RIGHT OF INJURED PARTY TO ABATE NUISANCE.

2. While it is a general rule that a person may, after notice, abate a private nuisance, exercising due care, whenever he might maintain an action for the injury caused thereby, yet he cannot so abate the nuisance unless he will suffer some damage—even though nominal only—from its continuance.

From Malheur: MORTON D. CLIFFORD, Judge.

Action by John Turner against J. D. Locy and others to recover damages for injuries to plaintiff's reservoirs. The facts are that plaintiff is the owner of a placer mining claim in Harney County, Oregon, through which Mormon Basin Creek, a nonnavigable stream, flows in a well-defined channel; that he built two dams in said creek, and dug a ditch therefrom whereby he diverted water to his mines. The defendant, Jed A. Blair, is the owner of a prior right of appropriation of the waters of said stream, which he diverts and uses in operating placer mines above plaintiff's, returning the water with the tailings to the creek. He placed dams in the creek to catch the sediment from his mines, and by opening gates therein, the debris is carried down stream and emptied into Willow Creek, into which Mormon Basin Creek flows; and, claiming the right to continue flushing the latter creek, and deeming plaintiff's dams a private nuisance and an obstruction to such right, he removed them, thereby destroying the reservoirs, whereupon this action was instituted, resulting in a judgment for plaintiff in the sum of \$300 against Blair, who appeals. AFFIRMED.

For appellant there was a brief over the name of *Olmstead & Miller*, with an oral argument by *Mr. Martin L. Olmstead*.

For respondent there was a brief and an oral argument by *Mr. John L. Rand*.

MR. JUSTICE MOORE, after stating the facts, delivered the opinion of the court.

1. The defendant and his witnesses were not permitted to testify concerning the length of time which he and his predecessors had used the waters of Mormon Basin Creek to carry off the tailings from his mine, or

that flushing the creek in the manner adopted by him was the only means whereby such tailings could be removed ; and, an exception having been taken by his counsel to the rejection of such testimony, it is insisted that the court erred in this respect. Assuming, without deciding, that an adverse user of the waters of a nonnavigable stream could be acquired by depositing in the bed thereof soil, gravel and stones, which could be carried off by suddenly precipitating into the channel of the stream a great quantity of water accumulated for that purpose, such right is not violated by a lower riparian proprietor who erects a dam in the stream whereby the debris is arrested, unless by retarding the flow of water he causes the disintegrated material to lodge upon the premises of the prior appropriator, or backs the water up, in consequence of which he sustains an injury. If the tailings put into Mormon Basin Creek by defendant were not lodged upon his mining claim by the plaintiff's dams, it is immaterial how long he or his predecessors in interest had been using the waters of said stream for the purpose of carrying them off, or that such creek was the only means whereby he could get rid of them. There was no evidence introduced tending to show that defendant had been injured in any manner by the construction of plaintiff's dams. In order to justify him, as a prior appropriator, in destroying these dams as a private nuisance, his premises must have been flooded by the backwater, or injured in some other way, in consequence of the obstruction to the flow of the stream : Cooley, Torts, 46 ; 1 Wood, Nuis. § 5 ; Angell, Water Courses § 332 ; *Gates v. Blincoe*, 2 Dana, 153 (26 Am. Dec. 440) ; *Stiles v. Laird*, 5 Cal. 120 (63 Am. Dec. 110). The defendant not appearing to have sustained any injury in this respect, no error was committed in rejecting the testimony so offered by him.

2. The court refused to give at defendant's request the following instructions: "The right to mine the placer ground of the United States or of private persons, by the use of water appropriated for that purpose from nonnavigable streams, carries with it the right to wash the tailings and mining debris into the natural channels of such streams whenever the channels of the streams become necessary for that purpose. Therefore, if you find from the evidence that it was necessary for the defendant Blair to use the channel of Mormon Basin Creek for the carrying away of tailings at the time complained of in the complaint, then the plaintiff had no right to put dams or obstructions in the channel of the creek which would prevent the defendant from washing away and carrying off mining tailings at such times as he required the use of the said channel for that purpose. The use of the waters appropriated from a stream for mining purposes is not only for washing out gold, but also for carrying away and removing the earth and gravel, the result of such washings. And the miner prior in right in the use of such water has a prior right to the use of the channels of a stream for the carrying away of the tailings by the use of such water in the channels of nonnavigable streams when necessary. Therefore, if you find from the evidence that defendant was using the waters of the stream through the channel of the said stream for carrying away tailings from his ground, or which were accumulated upon his grounds for mining purposes, then the plaintiff had no right to obstruct the channel of the stream in any manner whatever which would hinder the defendant Blair, or delay or prevent the free and unobstructed flow of the waters so used in the carrying away of such tailings." An exception having been taken to the refusal to give the instructions requested, it is maintained that the court

erred in this respect. The rule is well settled that a party may abate a private nuisance upon his own motion, after notice, when necessary, provided he does so without disturbing the peace, does as little injury as possible, and removes so much of the thing only as causes the nuisance, whenever he can maintain an action for the injury caused thereby, though the damages resulting therefrom be nominal only : *Angell, Water Courses*, § 389 ; *Brown v. Perkins*, 12 Gray, 89 ; *Amoskeag Manf. Co. v. Goodale*, 46 N. H. 53. To make out a case of special injury to property from a nuisance, something materially affecting its capacity for ordinary use and enjoyment must be shown : *Sparhawk v. Union Passenger Ry. Co.* 54 Pa. St. 401. Thus, where a party erected a dam so as to flow backwater upon the land of another, it was held that injury would be presumed, and no special damage need be shown : *Woodman v. Tufts*, 9 N. H. 88. So, too, an infringement of a right which, if continued, would ripen into an easement, entitles the party injured thereby to nominal damages, for which he may maintain an action without proof of special damages : *Tillotson v. Smith*, 32 N. H. 90 (64 Am. Dec. 355). An examination of the instructions refused will show that they are not predicated upon the assumption that the defendant sustained even nominal damages by the construction of the dam, or that the water flowed back upon his land so that if it were continued it would ripen into an easement. In the light of the rules to which attention has been called, if the defendant sustained no injury he could not maintain an action, and, if unable to maintain an action, he could not justify the demolition of the dams. Hence the instructions requested were immaterial, and no error was committed in refusing to give them.

The transcript shows that other exceptions were taken by the defendant at the trial, but, not being urged at the

argument or in his brief, they are deemed abandoned, and will not be considered here. It follows that the judgment is affirmed.

AFFIRMED.

Decided 2 July, 1900.

MENDELSON v. MENDELSON.

[61 Pac. 645.]

DIVORCE—CRUELTY AND PERSONAL INDIGNITIES.

A husband demanded of his wife that she compel her brother, who lived with them, to pay board. The wife objected to asking the brother to do so, out of gratitude to him for furnishing part of the money for the purchase of the home in which she and her husband lived. The brother was in the habit of coming home very late at night, to the disturbance of the household, and of rising late in the morning, thus disarranging the wife's breakfast plans. He would also sing vile songs in the presence of the family. *Held*, that the fact that the husband requested the brother to leave the house was not such "cruel and inhuman treatment" of his wife as to warrant a divorce under Hill's Ann. Laws, § 495, subd. 6.

DIVORCE—PROVOCATION—MUTUAL FAULT.

A husband had threatened to inflict, and had actually inflicted, bodily injury on his wife ten years before she sued for a divorce. Both had violent tempers, but she did not fear him. No further trouble occurred between them until shortly before the suit was begun, when she made some exasperating remarks to him, and he told her to go into the house, or he would kill her with a monkey wrench. On another occasion he quarreled with plaintiff and her daughter, and threatened to throw a flatiron at them; calling them "sons of ——— and damned fools." A few months later she asked him for money; and he told her: "No; damn you! you have all you will get from me,"—and told her to collect board from her brother, who lived with them, to which she replied, "I will see you in hell first." Defendant gave money to plaintiff's brother, and she called him a "God-damned fool" for doing so. *Held*, that it appeared that defendant's conduct was provoked by plaintiff, and that she was not free from fault, and her suit for divorce was properly dismissed.

From Baker: ROBERT EAKIN, Judge.

Suit for divorce by Etoile Mendelson against Louis Mendelson. From a judgment of dismissal, plaintiff appeals.

AFFIRMED.

For appellant there was an oral argument by *Mr. Jas. A. Fee*.

For respondent there was a brief over the names of *Chas. A. Johns* and *John L. Rqnd*, with an oral argument by *Mr. Johns*.

MR. JUSTICE MOORE delivered the opinion of the court.

This is a suit for a divorce, brought by the wife on the ground of cruel and inhuman treatment, and personal indignities, rendering her life burdensome. The cause, being at issue, was referred to J. S. Beckwith; and from the testimony taken by him the court found that the material allegations of the complaint were not substantiated, and rendered a decree dismissing the suit, from which plaintiff appeals.

The parties were married September 5, 1887, and their family consists of their daughter, Ida, ten years old, and Ethel, fifteen years old, plaintiff's daughter by a former husband. The plaintiff testifies that within a year after their marriage the defendant kicked nearly everything in their house to pieces, and a few months before Ida was born he struck her, causing her face to bleed, whereupon she left him and lived with a neighbor about a week, but upon his promise to treat her with greater consideration she returned to their home, the happiness of which was again soon disturbed, for just after their child was born he drove her out of the house with a pistol, saying he would soon end the business; that at his request she undertook to keep a boarder, at whom the defendant threw a plate of soup, and, seizing a carving knife, drove him from the house; that about October, 1897, having made some light remark concerning a harness which the defendant was repairing, he told her that if she did not go into the house he would kill her with a monkey wrench which he then held in his hand, but, remaining where she stood, he came within reach of but did not strike her; that about January 15, 1898, the defendant threatened to throw a flatiron at her and her daughter Ethel, calling them "sons of — and damned fools;" that about June 8, 1898, she requested him to

give her some money to purchase supplies for the family, to which he replied : " No, damn you ! you have all you will get from me ; " and, having said that she would not live with him any longer unless he provided for her necessities, he violently shook her, and, for pulling him away, he told Ethel she must leave the house, and threw a flatiron and a box of dirt at her ; that about July 23, 1898, the defendant told her that she was too extravagant and was keeping too many boarders, for whom he did not intend longer to provide, to which she replied that it was not necessary for him to furnish her any more provisions unless he chose to do so, at which remark he became angry, shook his fist in her face, and cursed and swore at her, saying that he was master there, and intended to see that their household affairs were conducted to suit him, whereupon she left home, and has since lived separate and apart from him. This is the substance of plaintiff's testimony, and the defendant's acts and language thus detailed constitute the cruel and inhuman treatment and personal indignities of which she complains. Mr. and Mrs. W. C. Miller, appearing as plaintiff's witnesses, seem to corroborate her testimony respecting a circumstance which she detailed. They say that about ten years prior to the trial herein, and just before Ida was born, the plaintiff came to their house, in Baker City, crying and holding a blood-stained handkerchief to her face and lips, which were swollen and bleeding. James Ash testifies that defendant, in answer to a suggestion by plaintiff that it was unnecessary to remove the shoes from a horse that had just been shod, told her to go into the house and attend to her own business, threatening to throw something at her that he held in his hand, but that she did not obey his command, nor did he execute the threat.

The defendant testifies that about June 8, 1898, he took

plaintiff by the arm to lead her into the house, to show her that he had some property therein, whereupon her daughter Ethel struck him and called him a "dirty dog ;" that on July 23, 1898, plaintiff having asked him for some money, he told her that, if she needed more money than he was able to furnish, she ought to ask her brother Lawrence, who had been staying with them about nine months, to pay his board, saying that he had secured work, and was then able to pay, to which she replied : "I will see you in hell first, before I ask him to pay board. Not while he lives in this house ;" that he told Lawrence the same day that he could not board him any longer, saying that the house would not hold them both, whereupon the plaintiff and her brother told him to leave, which he at first thought of doing, and went away and got a valise, but upon returning he notified Lawrence that he was the person who must leave. The defendant, further testifying, says that plaintiff having requested him to let her brother have some money, he gave him at one time \$3.50, and, having so notified her, she said : "You God-damned fool ! What did you give it to him all at once for ? You ought to give it to me, so I could give him fifty cents at a time." The reason defendant assigned for not keeping plaintiff's brother any longer was that he drank, gambled and visited houses of ill repute, usually returning about 3 or 4 o'clock in the morning, waking him and disturbing his rest ; that such dissipation prevented Lawrence from rising in time for breakfast, necessitating the preparation of an extra meal for him, after eating which he would use vile language and sing vulgar songs in the hearing of his daughter and her sister Ethel ; and that he heard the latter humming the tune of one of such songs. The defendant denies that he ever struck plaintiff or used bad language in her presence, but she does not deny the profane language so imputed to her, nor is defendant's testi-

mony concerning Lawrence controverted. The difficulty which resulted in the final separation of the parties was caused by the conduct of plaintiff's brother, who, upon being notified by defendant to quit his house, replied that he would not leave. The plaintiff held the legal title to their home, in the purchase of which her brother contributed \$200, and he also furnished her \$500 to pay off a mortgage she and the defendant had given on the premises. Plaintiff's gratitude to her brother for this financial aid undoubtedly furnishes the reason for her refusal to ask him to pay his board when so requested by the defendant, but, notwithstanding this, the defendant's demand that he should leave was not such cruel and inhuman treatment towards her as to warrant their separation. If it be admitted that the defendant called plaintiff the vile names which she says he did, and that she used the profane language imputed to her, she could not have been very much shocked by what she heard; for her own remarks to the defendant when he informed her that he had given her brother \$3.50, and when she was requested to ask her brother to pay his board bill, imply a familiarity with the use of such epithets as she claims the defendant applied to her. That the plaintiff did not seriously fear the defendant is evidenced by the fact that she did not flee when he threatened to strike her with the monkey wrench, though it is true her courage may have been stimulated by the presence of Ash, whom she may have thought able to defend her against his assaults. The defendant was certainly not a model husband, and may have struck plaintiff soon after their marriage, as she testifies; but for more than ten years thereafter, and until June 8, 1898, it does not appear that he laid violent hands upon her, and in that instance the assault was provoked by her. Believing, as we do, that the plain-

tiff was not free from fault, and that she is somewhat responsible for the treatment of which she complains, the decree must be affirmed, and it is so ordered.

AFFIRMED.

Decided 11 June, 1900.

BLAIR v. BOSWELL.

[61 Pac. 341.]

INJUNCTION—DAM—MINES.

If it be conceded that an upper riparian proprietor on a nonnavigable stream has a right to use the waters thereof to carry off tailings from his placer mines (about which the authorities are divided), still a court of equity will hesitate to enjoin a lower appropriator from damming the stream unless it is clear that the upper proprietor will be injured. That is not sufficiently evident in this case to justify equitable interference.

From Malheur: **MORTON D. CLIFFORD**, Judge.

Suit for an injunction by Jed A. Blair against L. Boswell and John Turner to enjoin the maintenance of dams constructed in a nonnavigable stream. The transcript shows that plaintiff's predecessors in interest built dams in Mormon Basin Creek, in Malheur County, Oregon, and made an appropriation of the water of that stream, which was conducted in ditches, and used in separating gold from the baser materials in which it was imbedded, after which the water was returned to the creek, carrying with it the tailings from certain placer mines. These dams are provided with gates, which, being opened, liberate the accumulated water, permitting it to flow down and flush the creek, carrying with it the debris. The defendant John Turner thereafter constructed dams in said creek about three miles below plaintiff's dams, and a ditch therefrom whereby he diverted the water so returned, and used it in operating his placer claim. The plaintiff alleges that he is the owner of the water of said

creek, and of the right to use the channel thereof from his dams to its mouth to carry off his tailings, and that the defendant unlawfully obstructed the flow of water therein, which will cause the bed of the stream to be filled with debris, and prevent the working of his mines. The answer having denied the material allegations of the complaint, a trial was had, resulting in a decree dismissing the suit, and plaintiff appeals. **AFFIRMED.**

For appellant there was a brief over the name of *Olmstead & Miller*, with an oral argument by *Mr. Martin L. Olmstead*.

For respondent there was a brief and an oral argument by *Mr. John L. Rand*.

MR. JUSTICE MOORE, after stating the facts, delivered the opinion of the court.

The testimony shows that defendant's lower dam is about eight feet high from the bed of the creek, and that the fall of water between plaintiff's and defendant's dams is 5.3 inches to the rod, so that, if it be assumed that the tailings from plaintiff's mine are arrested by defendant's dams, and settle horizontally in the bed of the creek, the surface of the precipitation would extend back from the line of obstruction only 18.11 rods, when, the reservoir becoming filled, the sedimentary deposit would flow over the top of the dam. The defendant's ditch by which he diverts the water to his mine taps the creek at a point below a low brush dam and above his said lower dam, and, if the debris fills the creek to the top of the latter, the ditch will be rendered useless, to avoid which the lower dam is provided with a gate, which, being opened, will permit the tailings to be carried down the creek. The distance from defendant's dams to the lower line of

plaintiff's placer claims is about one-half mile ; and when the fall of the creek is considered, showing that a dam 70.66 feet in height would be required to back the water to plaintiff's lower line, the probability of his sustaining injury by the maintenance of a dam eight feet high is certainly very remote.

It is contended that plaintiff and his predecessors in interest having deposited tailings in Mormon Basin Creek, and used the water thereof, for more than twenty years, to carry off the debris, a right was thereby acquired to continue such use, and, this being so, the court erred in denying the relief demanded. A conflict of judicial utterance exists respecting the right of a prior appropriator to use the water of a nonnavigable stream to carry off tailings. Thus, in California it would seem that such right is recognized: *Stiles v. Laird*, 5 Cal. 120 (63 Am. Dec. 110); *Irwin v. Phillips*, 5 Cal. 140 (63 Am. Dec. 113); *Sims v. Smith*, 7 Cal. 148 (68 Am. Dec. 233). In Montana, however, it has been held that prior locators of mining ground have no right to allow tailings to run free in a gulch, so as to render valueless the mining claims of subsequent locators below them: *Lincoln v. Rodgers*, 1 Mont. 217. Such, also, seems to be the rule in Idaho: *Ralston v. Plowman*, 1 Idaho, 595. Assuming, without deciding, that plaintiff has the right which he claims, a court of equity ought not to grant injunctive relief except when the right has been invaded in a manner which has resulted, or must inevitably result, in injury to the owner of the dominant estate, and, as the testimony shows that this cannot happen to plaintiff from the maintenance of defendant's dams as now constructed, no error was committed in denying the relief demanded ; for, if plaintiff could insist upon the uninterrupted flow of the water in Mormon Basin Creek because sediment from his mines had been carried down the stream by the current, he might

with equal propriety enjoin the erection of dams in Willow Creek, and in the Malheur, Snake, and Columbia rivers, into which each stream, respectively, flows, because it is possible that an atom of such sediment may reach the latter river. The plaintiff having failed to show that he has suffered or would necessarily sustain any injury to his premises from the maintenance of defendant's dams, the decree is affirmed.

AFFIRMED.

Decided 2 July, 1900.

OGILVIE v. OGILVIE.

[61 Pac. 327.]

37	171
44	316

DIVORCE FOR DESERTION—MEANING OF WILLFUL.

1. The word willful, as used in Hill's Ann. Laws, § 495, subd. 5, authorizing a divorce for "willful desertion," means an intentional forsaking, wrongfully and without cause, whereby the marital union is destroyed.

DIVORCE—EVIDENCE OF "WILLFUL DESERTION."

2. A husband went on a trip to be absent several months, leaving ample provision for his family. A short time before he returned his wife left his home, and went to her relatives, in a distant city, without disclosing her intention to any of the members of her husband's family, or leaving any message for him. Her husband did not hear anything from her until about three months after her departure, when he met her, and she told him that she left because she had feared bloodshed on account of a man whose attentions to her he had objected to. *Held*, that the conduct of the wife amounted to a "willful desertion," and that the husband was entitled to a divorce on that ground, after the expiration of a year from her departure.

DIVORCE—DUTY AS TO RECONCILIATION.

3. In cases of desertion the offending party may always return and offer a reconciliation, and if the injured spouse rejects such offer without other cause for continuing the separation, such spouse not only thereby consents to the existing condition, but assumes the position of an offender from that time. The injured party, however, need not make the first advance, but may safely rest on the situation already brought about.

INQUIRY AS TO WHAT MIGHT HAVE BEEN.

4. Disputes must be settled with reference to the existing facts, and not by conjecture or speculation as to what one of the parties would have done under a hypothetical state of facts; thus, where a wife has deserted her husband, he cannot be prejudiced by an inquiry whether he could or would have lived with her had she sought a reconciliation.

DESERTION—EVIDENCE OF OFFER TO RETURN.

5. The evidence does not satisfy the court that the wife ever made any genuine offer or attempt to return to her husband or to be reconciled after her desertion of him.

SEPARATION AGREEMENT—INFERENCE OF CONSENT TO DIVORCE.

6. A contract between husband and wife concerning their property interests, made after one of them has been so at fault as to warrant a divorce, is not a consent by either to a divorce, nor does it justify an inference that the cause of divorce was brought about by mutual consent: *Henderson v. Henderson*, 37 Or. 141, approved.

From Gilliam: W. L. BRADSHAW, Judge.

This is a suit for divorce by Alex. G. Ogilvie against Rose Ogilvie upon the ground of willful desertion for the period of one year. For a defense, the wife denies the desertion, and alleges that she left the plaintiff's home temporarily, at a time when he was absent in England, without any intention of deserting him, and that she returned, and proffered to resume her marital duties, but that he refused to allow her to do so.

The parties were married in 1885, and three children were born to them, to wit, Robert Gordon, Patrick Alexander, and Charles Freeland, aged, respectively, thirteen, nine and seven years. They lived together happily until about June, 1897, at which time the defendant admitted to plaintiff that she had permitted one Fred Earl, some time in the fall or December preceding, to put his arms about her. For this offense the husband chided her, or, as he says, told her that he "didn't think such conduct was right as a mother and wife," and, as she says, threatened that if he (Earl) ever stepped his foot on the ranch he would kill him and kick her out, and, upon meeting Earl, he directed him not to come about his ranch any more. This incident appears to have been amicably reconciled at the time, which is shown by the wife's testimony. She was asked, "He had made your home very unpleasant for you during that summer, had he?" to which she answered: "Yes, sir; that is, remembering the threat. Of course, he tried to make it cheerful enough afterwards." And, again, "He seemed to

have forgotten the threat?" to which she replied, "It appears so." Plaintiff was a sheep raiser by occupation, and lived upon a ranch some six or eight miles from the town of Fossil, but in September, 1897, preparatory to going on a visit to England, and for the purpose of making his family more comfortable during his absence, he purchased a dwelling in Fossil, and moved there with his family, including his mother, who had been living with the family for several years. He started to England the latter part of September, leaving ample provision for the comfort of his family until his return, and was absent until late in February, 1898. While away, he wrote to his wife frequently, and advised her as to the time of his return, telling her that he had presents for her and the children, sent by his relatives. On the twenty-eight of January, 1898, without indicating her purpose to his mother, she left her home and went to Albany to her relatives. The plaintiff returned in her absence, and was informed by neighbors that she had left home indefinitely, and had been advised by friends to sue for a divorce. This was the first intimation he had of her absence. He says that the first intelligence he had of her whereabouts was obtained the latter part of May, through a letter from her uncle requesting the return of money he let her have, which he paid, as desired. Touching the money matter there is some dispute, as defendant testifies that it was paid at her request after she went back to Fossil. She returned to Fossil on the seventh day of May, 1898, and went directly to a hotel; but, owing to plaintiff being on his ranch, he did not meet her until about June 5 following. She testifies that upon the morning of her arrival she went to their residence at Fossil, and, finding no one at home, she went in, prepared and ate her breakfast; that she re-

turned again at noon, and finding no one there, and the door locked, she returned to the hotel.

Concerning these circumstances, the plaintiff asserts that he had no knowledge until informed by her. When the parties met the plaintiff was talking to some men, and as she came up they recognized each other, and shook hands. She asked him to go aside for an interview, but he arranged a meeting with her at the residence, where she gave as her excuse for leaving him that it was to prevent bloodshed, which was afterwards explained to mean that she was afraid Earl would be hanging around, and that it would end in bloodshed. He states that she expressed a desire to have what was coming to her, and, when asked what she thought it was, replied that she would leave it to him; whereupon he told her that when they were married she had in the neighborhood of \$800 or \$900, to which she assented. He then told her that he would give her \$3,650, to which she was perfectly agreeable, and thereupon they arranged to go down to Mr. Hendricks' office the next morning and have the papers prepared. On cross-examination, he said his chief desire was to place her above want, and that the amount agreed upon at ten per cent. would give her an income of a dollar a day. He made no suggestion to her that she could remain at the house or live with him again. As touching his desire for a reconciliation, the following testimony was elicited: "Q. Well, do you mean to say that under the circumstances you could not live with her? A. I should say I could not, knowing what I knew. Q. Then, of course, you made no suggestion to her that she could remain at your house or live with you? A. I made no suggestion to that affect. Q. And if she had suggested that she desired to live with you, under the circumstances, you could not have permitted her to do so? A. I cannot be answerable for my feelings with regard to that matter.

Q. What would you have said to her if she had asked to return to you at that time? A. I cannot say, under the circumstances, what I would have said. Q. But you can say that under the circumstances you could not have lived with her? A. Of course, my feelings were naturally outraged at her conduct. Q. And, feeling in that way, you could not have lived with her? A. I cannot say. If she had shown a due disposition, probably it might have been patched up. * * * I can't say but what, if she had shown a due disposition and a sincere regret of what had taken place, what would have happened." She testifies that she first told him at this interview "she had come home to take up her family duties," and he replied "that he was done with women," and then it was she told him, at his urgent solicitation, that she would not ask for more property than she had when they were married. The plaintiff denies emphatically that she ever offered to return to him or to take up her family duties. His language is: "The facts of this conversation were that she made no request whatever of me in any form to return to me or be taken back as my wife."

She testifies that when she went back to Fossil she wrote two letters to her husband in her effort to see him, and that she kept copies of the letters. These copies were introduced in evidence, and marked Exhibits "A" and "B," over the objections of the plaintiff, without an effort to obtain the originals or to show their loss. It does not appear that the originals were posted, or in what manner, if at all, they were forwarded. The copies are in the following language:

EXHIBIT A.

"My Dear Husband:

I thought I would drop you a few lines to let you know where I am. I am at Mrs. Spears' hotel. Come up Sunday. I want to see you. I have your ring, and I wear

it, and when I take it off my finger you will know I am not true to you. You have mine. So believe me your ever loving wife,
ROSINA J. OGILVIE."

EXHIBIT B.

"My Dear Husband:

I thought I would write to you, and let you know where I got my money to go away on. I sold my black dress for seven dollars. That took me to Portland. I stayed with Mrs. Robberson a week. Then I got ten dollars from Cyrus Buffington. Then I went to Albany. There I remained with my father's folks till I was ready to come home. Then I borrowed twelve dollars from Uncle Davie Froman, and I want you to let me have the money to send him, for I shall not see H. H. Hendricks about anything; so I want the money to send right away. So believe me your wife,
R. J. OGILVIE."

The plaintiff in his rebuttal does not deny having received these letters, nor was his attention called to them. On the day defendant returned to Fossil, Harry Reed, who was then living in the plaintiff's house with his family, took plaintiff's mother and his children out to the mother's homestead, some four or five miles from town, and there is evidence in the record that she hurried the children away after hearing of defendant's return; but it appears that the latter went out to the homestead, visited the children, had dinner with her mother-in-law, and passed the time pleasantly.

On the day following the interview of the parties at the house they entered into the following agreement, which was drawn up by the attorney for the plaintiff:

"This agreement, made this thirteenth day of June, 1898, at Fossil, in Gilliam County, Oregon, by and between Alex. G. Ogilvie, party of the first part, and Rose Ogilvie, party of the second part, witnesseth that

Whereas the said Rose Ogilvie, having had in property at her marriage with Alex. G. Ogilvie of the value of \$900,

which her husband, Alex. G. Ogilvie, has had the use of in his business, and the said Rose Ogilvie having deserted the said Alex. G. Ogilvie, and now asks for a division and final settlement of all property affairs and interests between them,

It is hereby agreed that the said Alex. G. Ogilvie shall, in consideration of the \$900 aforesaid, and in the further consideration of the said Rose Ogilvie relinquishing all her right in all the real and personal property of the said Alex. G. Ogilvie, which he now has or may hereafter acquire, forever, which the said Rose Ogilvie hereby agrees to do, pay unto the said Rose Ogilvie the sum of \$3,650 on or before five years from date, with interest at ten per cent. per annum, payable quarterly, and that he will give his note as evidence thereof, and give satisfactory security therefor. It is also agreed that Alex. G. Ogilvie shall educate and support the children, issue of their marriage, to wit, Robert, Patrick, and Charlie Ogilvie, and have the care and custody thereof, but that he will not refuse the said Rose Ogilvie at any time to visit them."

Mr. Hendricks testifies touching this paper that when the parties came to his office he inquired into the matter of their agreement; that the plaintiff said, among other things, "My wife has left my home indefinitely," to which she freely assented, but remarked that she believed that they might some time live together, but it wasn't proper for them to try to do so now.

It appears further from the testimony that in the December prior to her departure she met Earl at the home of her sister, some seven or eight miles from Fossil, and she was heard to say to him, "well, Fred, I am going away, whether you do or not." She freely admits this interview. It further appears that she wrote a letter to Earl, and sent it to him inclosed in another letter directed to a friend. This letter was read to him by another person, who testifies to its contents, which were, in effect,

that she wanted him to meet her at the back porch of their residence in Fossil, at 8 o'clock of the evening designated; but she testifies that he did not meet her at the time, and states that her reason for wanting to meet Earl was to request him to go away so that no harm could come to him from her husband. The plaintiff and defendant next met in the latter part of January following at the Perkins Hotel, in Portland, Oregon, which was the only other meeting they had within a year from the time of her leaving him. At this time the defendant signified to plaintiff her desire to have an interview with him. He excused himself by saying he did not have his breakfast, but agreed to return to the hotel and see her later, which he failed to do. They had other conversations on the ninth and tenth of July, 1899, but these are not material to this controversy, and will not be further alluded to. The trial court rendered a decree of divorce in favor of the husband, from which defendant appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. W. H. Wilson*.

For respondent there was a brief over the name of *Hendricks & Bowerman*, with an oral argument by *Mr. H. H. Hendricks*.

MR. CHIEF JUSTICE WOLVERTON, after stating the facts in the foregoing language, delivered the opinion.

This is a brief resume of the evidence in the case, without attempting to quote the witnesses at large, and upon this testimony it is insisted (1) that it has not been shown that the defendant willfully deserted plaintiff; and (2) that it has been shown that the plaintiff assented to her

living separate and apart from him, and therefore that desertion contrary to his will and without his consent has not been established.

1. "Desertion" has been defined by Mr. Bishop in his work on Marriage, Divorce and Separation (vol. 1, § 1662), to be the "voluntary separation of one of the married parties from the other, or the voluntary refusal to renew a suspended cohabitation, without justification either in the consent or wrongful conduct of the other." This language is quoted with approval in *Sisemore v. Sisemore*, 17 Or. 542 (21 Pac. 820). Perhaps a more terse definition is that given in 9 Am. & Eng. Enc. Law (2 ed.), 764. The author says: "Desertion is the willful termination of the marriage relation by one of the married parties without lawful or reasonable cause, or a refusal without reasonable cause to renew the marriage relation after the parties have been separated." An intentional desertion is willful, within the meaning of the term as defined by the statute. The term does not carry with it the element of malice or a purpose of doing injury. The act is willful when there is a design to forsake the other spouse wrongfully or without cause, and thereby break up the marital union: *Benkert v. Benkert*, 32 Cal. 467. Before the plaintiff can prevail, he must therefore show that the defendant willfully—that is, intentionally and wrongfully, or without cause—deserted him, and continued in such desertion for the space of one year.

2. Aside from what defendant said to Earl, there is nothing in the record to show her intention except the circumstances attending the act. She left home without leaving any message for her husband, of whose early return from England she had been advised, or without disclosing her purpose to her mother-in-law, with whom she left her children. She remained away some three or four months, without writing to any of the family except her

son. There appears to have been no legitimate cause or sufficient excuse for her going. The only one assigned by her is that she was afraid there might be bloodshed; but, if there was ever any real danger of such a thing, it was wholly within her power to have prevented it by a considerate loyalty to her husband. The intention to desert may be shown by the acts and circumstances attending the separation: *Morrison v. Morrison*, 20 Cal. 431; 1 Nelson, Div. & Sep. § 107. In the present instance, such intention is palpably manifest. The burden is also with the plaintiff to show that the desertion was wrongful or without just cause, and there is no question but that this has been shown, as it relates to the separation primarily.

3. This brings us to the second feature of the case, which, under the facts proven, is more difficult of solution. It may be predicated of the statute that the desertion must continue for the period of one year,—that is to say, the act is continuing in its nature,—and, if suspended in the meanwhile by reconciliation or by the repentance of the party at fault, with a proper and sincere effort towards reconciliation, manifesting a purpose to return and again resume the marital relations, then the desertion is at an end. If the parties separated by mutual consent and understanding, then there is no desertion, because of the consent to the existing relations. So, if there is willful desertion without cause, and the party in fault in good faith seeks a reconciliation, and the other party repels it without other cause for continuing the separation, he thereby assents to the prevailing condition. What is more, he is himself put in the fault, and is guilty of desertion, such as will constitute a cause for divorce against him: *Crow v. Crow*, 23 Ala. 583. The rule is well stated and illustrated by Mr. Justice BAILEY, in *Albee v. Albee*, 141 Ill. 550 (31 N. E. 153),

under a statute making two years' desertion a cause of divorce. The case is so apt that we may be pardoned if we quote somewhat at length: "However willful the desertion may be, and however destitute of reasonable cause, it is no ground for divorce, unless it is continued for two years. At any time during that period the offending party has an undoubted right to put an end to it, and if that is done no cause of divorce has arisen. If at any time during the two years the party guilty of the desertion, in good faith and with an honest intention to resume marital relations, returns, or offers to return, to the deserted husband or wife, the continuity of the desertion is broken. Nor can the deserted party prevent this by refusing to receive back and to resume marital relations with the one guilty of desertion. He or she cannot, because the other has taken a position, however willful or causeless it may have been, hold him or her to it. For the two years the door for repentance and return must be kept open, and, if it is closed and barred when an offer to return is made in good faith, not only is the desertion terminated, but the circumstances may be such as to reverse the legal attitude of the parties, and constitute the party originally offended against, from that time forth, the offender." Nor has the husband, as declared by Mr. Vice-Chancellor VAN FLEET, in *Newing v. Newing*, 45 N. J. Eq. 498 (18 Atl. 166), a "right to require his wife, even when she is in the wrong, to crawl back to him. It is his duty to take her back upon such terms as will permit her to preserve her self-respect." The husband, however, is not called upon, where the wife has willfully deserted him, to make overtures to her, or to entreat her to return, upon pain of having his silence construed as a consent to her separation from him.

4. Closely allied to this thought is another, which is that the relationship could not be changed by an inquiry

as to what he might have done if his wife had made proper overtures for reconciliation. Such an inquiry is speculative and conjectural, and is not a suitable test of the husband's purpose. "No person knows what he would have done under conditions in which he was never placed:" *Monteath v. Monteath*, 51 Ill. App. 126. Mr. Justice HOLMES has covered both phases of the question in *Ford v. Ford*, 143 Mass. 577 (10 N. E. 474), wherein he says: "When one party terminates the cohabitation by desertion, the other is not bound to take any steps to restore it. If he remains silent until he files his libel, his silence does not take away his right to a decree. Conduct which in itself is proper cannot be made improper by inquiring what he would have done in an event which did not happen. The mode of testing that was for the wife to offer to return. A tender under a contract would not be excused by the contractee's subsequent admission that he would not have accepted it if made, provided he had done no overt act or waiver. In general, a person does not lose rights which he may lawfully renounce until he has renounced them by an overt act." There are authorities which seem to impose a larger duty upon the husband, and require him to seek the wife, and entreat or make some especial effort to induce her to return. See *Newing v. Newing*, 45 N. J. Eq. 498 (18 Atl. 166); *Herold v. Herold*, 47 N. J. Eq. 210 (20 Atl. 375, 9 L. R. A. 696); *Wright v. Wright*, 80 Mich. 572 (45 N. W. 365). But it is doubtful whether these authorities go to the extent of holding that such advances should be made where the husband is entirely blameless for his wife's acts. The whole doctrine seems to be well stated in *Herold v. Herold*, 47 N. J. Eq. 210 (9 L. R. A. 696, 20 Atl. 375), as follows: "It is abundantly established that a husband who, not being blameless for the act, makes no effort to prevent his desertion by his wife,

and appears to acquiesce in and be satisfied with its continuation, cannot appeal successfully to the court for a divorce on the ground of desertion." Again, it is a question for the court to determine, under the circumstances of the case, whether the offer to return and renew the cohabitation is made in sincerity, and with a *bona fide* intention to renew the marital duty: *McClurg's Appeal*, 66 Pa. St. 366.

5. With this understanding of the law, we must now inquire whether the defendant has, in fact and in good faith, made overtures to the plaintiff, with a genuine purpose of reconciliation, and, if so, whether the plaintiff has, without good cause, rejected them, so as to put him in the fault, or in the position of having consented to her separation from him. The letters of Mrs. Ogilvie, written to her husband at Fossil, purported copies of which were received in evidence by the court below, are relied upon somewhat as showing her desire to return. It may be well doubted whether these are properly in evidence for any purpose; but, even if we admit them as evidence in the case, they do not prove what is contended for them. In the first she says: "I thought I would drop you a few lines to let you know where I am. I am at Mrs. Spears' hotel. Come up Sunday. I want to see you. I have your ring, and I wear it, and when I take it off my finger you will know I am not true to you." There is here no indication that she desired to again renew the marital relations between them, nor does she intimate that the purpose of the desired interview was to effect a reconciliation in any manner with her husband. That she still wore the ring as a sign that she was true to him could not be construed that she desired a reconciliation. The second letter was entirely concerning money matters, and does not even request an interview. She testifies that she told him at the interview at the house that she had come back

to take up her family duties again ; but the offer does not impress one as having been made with a sincere purpose, if, in fact, she made it at all, which is doubtful, in the face of his strong denial, accompanied by circumstances tending to his corroboration. It does not appear to have been attended with any attempted explanation of her acts, and, standing alone, is a meaningless formality. Upon the next day, by the terms of the written agreement, she formally declared that she had deserted her husband. This she could hardly have been induced to do if she had a genuine yearning for the restoration of the marital relations with him. She may not have been settled in her own mind as to what she might do in the future, as she said to Mr. Hendricks that she believed they might live together some time, but she had determined that it "wasn't proper for them to try to do so now." The manner of her attempted interview with her husband at Portland does not indicate any desire upon her part to return to him, as she merely asked for an interview, without disclosing any purpose whatever, and for aught that appears she may have had in view something entirely foreign to a reconciliation of their differences. In view of all the evidence, and in the light of surrounding circumstances, we can come to no other conclusion than that defendant is still in the fault, that plaintiff has in nowise assented to her desertion of him, and is therefore entitled to a divorce.

6. Another question was presented in connection with the written agreement between the parties, which is that the writing shows an assent by the husband to the separation. This agreement was made, however, after it had actually taken place by the desertion of the wife ; and it was held in *Henderson v. Henderson*, 37 Or. 141 (38 L. R. A. 766, 60 Pac. 597), that where a separation has been induced, not by collusion, but by the vicious conduct of one of the parties, without inducement or fault of the

other, and it has furnished just grounds for divorce, then a contract looking to a settlement of the property rights and the proper maintenance of the one not in fault could properly be entered into, as not repugnant to public policy. Such an agreement does not justify an inference that there was a separation by mutual consent: *Nichols v. Nichols* (Ky.), 11 S. W. 286. The decree of the court below will be affirmed.

AFFIRMED.

Decided 18 June, 1900.

MULDRICK v. BROWN.

[61 Pac. 428.]

87	185
43	248
443	252

INJUNCTION AGAINST DESTRUCTIVE TRESPASS ON MINES.*

1. A court of equity will restrain a person preparing to extract ores from another's mine, though a trespass, since such extraction would destroy the substance and value of plaintiff's estate: *Bishop v. Baisley*, 28 Or. 119, followed.

AMOUNT OF ORE REQUIRED TO SUPPORT A CLAIM TO A MINE.

2. Under Rev. St. U. S. § 2320, requiring the discovery of a vein or lode within a quartz claim before any right can be acquired thereto, it is enough to entitle the discoverer to protect his mining rights if ore or metalliferous rock be found in place sufficient to warrant a prudent man in spending time and money on it, though it may not contain ore in paying quantities.

From Grant: MORTON D. CLIFFORD, Judge.

Suit by John Muldrick and others against Walter Brown and others to enjoin a trespass upon a mining claim. The complaint alleges, in substance, that on February 4, 1886, J. A. Whitman located a gold-bearing quartz claim in Grant County, known in the record as the Zero, and four days thereafter caused due and legal notice of such location to be filed and recorded in the clerk's office; that on January 9, 1896, plaintiff Muldrick and Whitman jointly located another gold-bearing quartz claim, known in the

*NOTE.—On this question of injunction against a trespass, see *Ewing v. Rourke*, 14 Or. 514; *Allen v. Dunlap*, 24 Or. 229; *Bishop v. Baisley*, 28 Or. 119; *Parker v. Furlong*, 37 Or. ———. REPORTER.

record as the Piedmont, which, according to the notice of location and their contention, lies immediately west of and adjoining the Zero, and notice thereof was filed and recorded on the next day; that subsequent to the location of the Zero claim, and prior to the commencement of this suit and the trespass complained of, Whitman, for a valuable consideration, sold and transferred to the plaintiff Muldrick an undivided half interest therein, and thereafter sold and transferred all his right, title and interest in and to both claims to the plaintiff Mason, who subsequently transferred an undivided interest to the plaintiff Finlayson; that ever since their location the plaintiffs, their grantors and predecessors in interest, have been in the actual possession of both claims, and have during each and every year expended more than \$100 on each claim, and have in all things complied with the laws of the United States and of this state, and with the local customs, rules and regulations of miners, and were so in possession on the twenty-second day of April, 1897; that on the day last named the defendants wrongfully, unlawfully and against the plaintiffs' will, entered upon such claims with picks, shovels and other like instruments, and began the construction of a mining ditch across and within the boundaries thereof, and threaten and are about to begin to extract the gold therefrom, to the irreparable loss and damage of the plaintiffs, and will do so unless restrained by the court; that the defendants, and each of them, are insolvent, and unable to respond in damages for such unlawful acts and trespass.

The answer, after denying specifically certain allegations of the complaint, admits that notices of the Zero and Piedmont claims appear of record, as alleged, but avers that they do not refer to nor describe the premises in controversy, except as to a portion thereof more particularly set forth; admits that the defendant Brown

was about to begin work within the boundaries and upon the mining ground claimed by plaintiffs, and to extract the gold therefrom, and would continue to do so unless restrained by the court, but denies that such ground belongs to the plaintiffs or any of them. For a further and separate defense, it is averred that at the time of the alleged trespass the land mentioned and described in the complaint was unappropriated placer mining ground of the United States, open to purchase and location under the mining laws, rules, and regulations of the Interior Department; that on November 5, 1896, the defendant Brown and J. C. Cobb, as they might well and lawfully do, entered upon the ground referred to, and made a placer location thereon, according to the rules and regulations aforesaid; that no vein or ledge of quartz rock in place bearing gold, existed throughout said ground, but the whole thereof was valuable only for the gold contained in the earth, gravel, and sand and rock float thereof, and could only be worked, enjoyed, located, and purchased as placer mining ground of the United States; that no portion of the ground so located in any way covers or interferes with any portion of the Piedmont mining claim; that a small portion of the Zero claim is covered by the defendants' placer location, but exactly what portion the defendants have not been able to ascertain on account of the injunction.

For a further and separate defense by way of estoppel, it is alleged, in substance, that plaintiffs ought not to be heard to claim the mining ground described in their complaint as against the defendants, because prior to the location by them the plaintiff Muldrick assured the defendant Brown that there was no quartz ledge or quartz in place ever discovered therein, and it was open to placer location, and invited him to take up the same as a placer claim; that, relying upon such assurances, Brown made

the location, and has expended large sums of money in the purchase of water rights and ditches adjacent to such ground, in order to work the same; that prior to this suit, and before the purchase by the plaintiffs Mason and Finlayson of Whitman's interest in the Piedmont and Zero mining claims, Whitman represented to and assured the defendant that no quartz lodes or quartz in place had ever been discovered in the Zero or Piedmont claims, that he had abandoned all rights under the location thereof; and that plaintiffs Mason and Finlayson purchased with knowledge of such facts. The affirmative allegations of the answer being put in issue by the reply, a trial was had upon the testimony reported by the referee, resulting in a decree in favor of the plaintiffs, and the defendants appeal.

MODIFIED.

For appellant there was a brief and an oral argument by *Messrs. Victor Z. Cozad and Thornton Williams*.

For respondents there was a brief and an oral argument by *Mr. John L. Rand*.

MR. JUSTICE BEAN, after making the foregoing statement of the facts, delivered the opinion of the court.

1. The evidence is quite voluminous, but a large portion of it is irrelevant and immaterial. The questions presented are substantially questions of fact. It is claimed at the outset that the plaintiffs have not made out a case requiring the interposition of a court of equity. Under the practice in this state, the jurisdiction of courts of equity is freely exercised to prevent trespass upon mines, for the reason that the extraction of ores therefrom reaches to the substance and value of the estate, and goes to the destruction of the very essence thereof: *Bishop v. Baisley*, 28 Or. 119 (41 Pac. 936). It is not only alleged in the

complaint, but admitted in the answer, that the defendants were engaged in preparing to extract the ores from the ground in dispute, and would have done so had they not been restrained by the preliminary injunction, and therefore the record is sufficient, under the authorities, to give a court of equity jurisdiction. Some claim was made at the argument that the allegations of the complaint are insufficient, but whatever defect there may be in this regard is cured by the answer, and it is now too late to insist upon the objection.

We proceed, then, to a consideration of the case upon the merits. As we understand the record, the questions presented are: (1) Was there a valid location made of the Zero and Piedmont claims by the plaintiffs and their predecessors in interest? (2) Does any part of the placer claim as located by the defendants interfere with or cover the ground claimed by the plaintiffs? (3) Are the plaintiffs estopped by their conduct from asserting their right as against the defendants?

2. It is contended that no gold-bearing vein or lode was discovered within the limits of either the Zero or Piedmont claims prior to their location, and for this reason the plaintiffs are not entitled to the ground as a quartz mining claim. Under the provisions of Section 2320, Rev. St. U. S., no right can be acquired to a quartz claim before the discovery of a vein or lode within its limits; but the finding of ore or metalliferous rock in place in a defined vein is sufficient to satisfy the statute, although it does not contain ore in paying quantities. If the rock in place is sufficiently encouraging to warrant an ordinarily prudent man in spending his time or money upon it, it is sufficient, as against a subsequent locator for mining purposes: *Barringer & A., Mines and M.* 214; *Montana Cent. Ry. Co. v. Migeon* (C. C.), 68 Fed. 811; *Harrington*

v. *Chambers*, 3 Utah, 94 (1 Pac. 362); *Burke v. McDonald*, 2 Idaho, 1022 (29 Pac. 98).

Mr. Whitman, who located the Zero claim in 1886, testifies that before locating it he discovered a well-defined quartz lode or rock in place sixteen or eighteen inches thick; that he then measured off the claim on the ground as accurately as he could, building monuments of stone around each stake from two to two and a half feet in height; that he posted not less than six stakes, one at each end of the ledge, and one at each corner of the location, and marked those at the corners; that afterwards he made an open cut until he had obtained a trace of maybe nine feet or more, and then extended a tunnel about one hundred and fifty feet for the purpose of tapping the ledge; that since the location he had expended each year more than \$100 in work and improvement on the claim; that he also located the Piedmont claim in 1894, but the notice was not recorded until 1896; that before locating the claim he discovered within its limits a quartz ledge which he traced for quite a long distance, but did not make any measurements; that after discovering such ledge he drove end stakes and posted corner stakes, after a careful measurement by a compass and measuring rod; that he posted a stake at each corner, and also one at the center of each end, and built monuments around them; that he took a copy of the notice he posted on the claim and gave it to the plaintiff Muldrick to be recorded, but for some reason it was not recorded until two years thereafter; that after the location of the Piedmont claim he placed on the ground an outfit,—tools, picks, shovels, wheelbarrows, and everything necessary for the work,—and that a part of these implements or tools were there all the time; that he lived a short distance down the hill from the east line of the Zero, and that when not working these quartz claims he

was engaged in hydraulic mining, and passed them every day ; that from the time of the location of the two claims he and his co-owner, Mr. Muldrick, had been in possession thereof, claiming to own them ; that he maintained the stakes marking the boundaries of the claims, and examined them carefully every fall and spring, always replacing any that had been moved. The witnesses Gifford, Guker, Silsby, Bartram, and Johnson testify that they examined each of the claims referred to, and found well-defined veins or lodes of gold-bearing rock in place on each claim. There is other evidence to the same effect, and from an examination of the entire testimony we are satisfied that the plaintiff's contention in this regard is sustained by a large preponderance of the evidence. The great bulk of the evidence on this point seems to be directed to the question as to whether the quartz found upon the claims is sufficiently rich to justify working them as quartz claims. But, as we have already seen, that is a matter wholly immaterial in this controversy. The law does not require any particular degree of richness in order to support a quartz-claim location. It only requires that there shall be sufficient indication to justify a reasonably prudent person in expending his time and money in its development, and there is abundant testimony in this case to satisfy such requirement. Indeed, the fact that Muldrick and Whitman were willing to and did expend considerable sums of money in the development and maintenance of the Zero and Piedmont claims is quite strong evidence of that fact. So that we shall pass without further notice this branch of the case.

It is next claimed that the Zero and Piedmont are not adjoining claims, but that the southeast corner of the Piedmont is some six hundred feet or more in a northwesterly direction from the southwest corner of the Zero, thus

leaving a triangular shaped piece of ground between the two claims. Mr. Whitman, who located both claims, testifies positively and unequivocally that the northwest corner of the Zero and the northeast corner of the Piedmont and the southwest corner of the Zero and the southeast corner of the Piedmont are common points, and that the west line of the Zero and the east line of the Piedmont is a common line; and he is corroborated by the entire circumstances of the case, and especially by the location notice prepared and recorded months before this controversy arose, which states that the east line of the Piedmont claim is the west line of the Zero. The contention of the defendants in this regard is based largely, if not entirely, upon alleged declarations of Whitman to Brown and others that the northwest corner of the Piedmont was marked by a certain fir tree near a tap in the Whitman ditch. But these alleged statements are denied by Mr. Whitman, and the testimony relating thereto is not sufficient to overcome the other evidence in the case bearing upon the location of the Piedmont claim. In our opinion it is quite clear from all the testimony that the two claims lie adjoining, and that there is no unappropriated ground between them.

The remaining question, and the one principally relied upon, is the alleged estoppel. The claim upon this point is that, prior to the placer location by defendants, Brown had a conversation with the plaintiff Muldrick, in which he (Muldrick) said that he and Whitman had been unable to find a quartz ledge or vein on either the Zero or Piedmont claim, and if Brown would locate a placer claim covering the ground it would be all right, if he would agree to deed to them any quartz ledges which might thereafter be found within the boundaries of his placer claim; that, acting upon this statement and proposition, and relying upon Muldrick's representations, the defend-

ants located the placer claim, and a few days later Brown purchased for \$1,100 a ditch and water right necessary to work it. This branch of the case, so far as it concerns the defendants, depends principally upon the testimony of Brown. In his direct examination he testifies that, in a conversation with Muldrick prior to the location of the placer mine, Muldrick told him to go out and make such location if he wanted to. He also testifies that he had some conversation with Whitman about the matter after the location had been made, and that Whitman made no objection to his occupying the ground or mining thereon. On cross-examination, however, he testifies as follows in answer to interrogatories: "Q. Now, then, Mr. Brown, the date of some of these conversations you had with Muldrick and Whitman. When was it that Muldrick told you to locate the placer in the vicinity of Quartz Gulch? A. I don't think he ever told me to locate the placer. Q. Did he ever tell you to locate any of the ground at or near Quartz Gulch? A. No, sir; he never told me to locate it. Q. He didn't? A. No, sir; I lived in Muldrick's house, and we talked together so often that it would be hard for me to designate the times. Q. Did he tell you to locate any part of the Zero or Piedmont as placer? A. No, sir; he never told me anything of that kind. Q. Did Mr. Whitman tell you to do any such thing? A. No, sir. Q. How did you come to locate the placer you made over the Piedmont? A. I just put up a location. Q. Just of your own accord? A. Yes, sir. Q. Muldrick didn't tell you to do so? A. He didn't tell me to do it; no, sir. Q. Didn't advise you to do it? A. No, sir; but he didn't object. Q. Nor Mr. Whitman didn't tell you to do it? A. No, sir. Q. Nor advise you to do it? A. No, sir. Q. You simply went out there and found what you thought was placer, and located it? A. Yes, sir.

Q. That is a fact, is it? A. Yes, sir. Q. At that time you didn't know there was any such claim as the Zero or Piedmont? A. No, sir. Q. You did not? A. No, sir; not by that name. Q. You never asked the permission of Muldrick to go on that ground and work it for placer,—the surface? A. No, sir; I did not." Thereafter, on re-direct examination, in reference to the same matter, he says that his previous statement that Muldrick never told him to locate the ground was a mistake, and that he did not mean to make it. He then proceeds to testify, in very great detail, to a conversation he claims to have had with Muldrick in October or November, 1896, in which Muldrick said that Thompson and Grott were claiming an interest in the mining claim by reason of some work done thereon, and in order to bar them it was agreed that he (Brown) should locate the ground as a placer claim, and deed back to Muldrick whatever portion thereof he might want. It thus appears that Brown's testimony is of itself not consistent, and, so far as the alleged conversation with Muldrick and Whitman is concerned, he is flatly and positively contradicted by both of them. They testify that they never had any such conversations with him, and never agreed that he might file the placer location on their ground, or encouraged him in any way to do so, but, on the contrary, that they both objected to his location as soon as they were advised of it, and notified him to keep off the ground. We are of the opinion that the preponderance of the testimony is in their favor on this point.

Soon after or about the time the placer location was made by the defendants, Brown purchased of Hupprich for \$1,100 a placer mine and certain water rights appurtenant thereto, for the purchase price of which he asked plaintiff Muldrick to go his security; stating, as he claims, that he desired the ditch and water rights for the pur-

pose of mining on the placer claim, located a few days before. Muldrick agreed to go his security for the amount of the purchase price, but Hupprich was unwilling to sell except for cash in hand, which Brown obtained a few days later. The claim is made by the defendants that this was sufficient to estop Muldrick from questioning the validity of Brown's placer location, but Muldrick denies that Brown told him he desired the ditch and water rights for use in mining on the placer ground. He testifies that he understood and supposed at the time that Brown was simply purchasing Hupprich's interest in the claim for the purpose of working it. We think, therefore, the evidence on this point is not sufficient to constitute an equitable estoppel.

There are many other incidental questions covered by the testimony, but it is unnecessary to notice them in detail. It is sufficient to say that, after a careful examination of the record and the exhaustive briefs of counsel, we are satisfied the decree of the court below should be affirmed, except in so far as it may enjoin the defendants from using that portion of the Hupprich ditch which passes over or across the Zero claim, for the purpose of conveying water therein; and to that extent it will be modified.

MODIFIED.

Decided 18 June, 1900.

MCBEAN v. MCBEAN.

[81 Pac. 418.]

EVIDENCE OF MARRIAGE.

1. Upon a consideration of the testimony herein, *held*, that it is not sufficient to establish a marriage of plaintiff's ancestor.

MARRIAGE ACCORDING TO INDIAN CUSTOM.

2. Where a marriage has taken place between two members of an Indian tribe, or between a white person and a member of the tribe, according to tribal customs, the union is binding everywhere in the United States.

87	195
130	142
37	195
e45	123

PRESUMPTIONS AS TO THE EXISTENCE OF A MARRIAGE.

3. The presumption of a lawful marriage from the fact that the parties have lived together and cohabited as husband and wife does not arise where the proof indicates that the relations were entirely meretricious from their inception.

DESCENT OF INDIAN LANDS—REPEAL OF STATUTE.

4. Supp. Rev. St. U. S. p. 886, § 5, providing that, for the purpose of determining the descent of land to the heirs of Indians, the offspring of Indians who have cohabited together as man and wife shall be deemed to be legitimate, is general in its purpose, and does not repeal or in any way affect the special act of 1885, relating to the allotment of lands to the Umatilla Indians, and enacting that the law of alienation and descent in force in the State of Oregon shall apply thereto.

From Umatilla : **STEPHEN A. LOWELL**, Judge.

Suit by Cora McBean against Jane McBean and others to determine who are the heirs of John McBean, deceased. From a decree in favor of defendants, plaintiff appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Messrs. Henry J. Bean* and *J. H. Lawrey*.

For respondents there was a brief over the names of *Oscar Cain* and *Thos. G. Hailey*, with an oral argument by *Mr. Hailey*.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

1. John McBean, an allottee of one hundred and sixty acres of the Umatilla Reservation, in Umatilla County, Oregon, designated in the allotment as "Cayuse Mixed Blood No. 388," died intestate, leaving surviving him his mother, brothers and sisters, and nieces and nephews, who are the defendants herein. The plaintiff claims to be his granddaughter, and the only living descendant of heritable blood, and the purpose of this suit is to determine her right to the title and to the rents and profits of the land so allotted to him. Plaintiff is the daughter of William McBean, the son of John and an Indian woman, whose maiden name was Jane Timoochin, the daughter

of the Nez Perce chief. The question upon which the case hinges is whether William was born in lawful wedlock, as to which there is much conflict in the testimony. John McBean was of mixed blood, but had no tribal relations with the Indians until 1887, when he was adopted by the Umatillas, chiefly for the purpose of sharing in the allotment. When about fourteen years old he was employed by the general government as interpreter between the Indians and the agents and representatives of the government. John W. Gay, a witness of much intelligence, testifies that he met John in 1854 at Governor Stevens' council with the Indians, when he was twelve or thirteen years of age, and again at The Dalles in 1856; that he first saw Timoochin's daughter during the winter of 1857 and 1858, who at that time was living with John McBean in a tent back of the garrison at Fort Walla Walla; that he was not married to the woman, but was simply living and cohabiting with her as some of the unmarried officers and private soldiers did with other Indian women who stayed about the garrison, and that these relations continued for a year or a year and a half. Joseph McEvoy relates that he became acquainted with John McBean in 1856; that witness was then a soldier, and that McBean was an interpreter for the government, and served in the same company with him; that witness was afterwards connected with the quartermaster's service, and that they continued under military discipline until 1861, and that McBean could not leave during the time without a pass or furlough from the proper officer; that he began living with this woman in a tent on Garrison Creek in the fall of 1857, possibly not until 1858, and that they lived together about a year and a half in a tent procured from the quartermaster.

John Silcott testifies that he first knew John McBean in Walla Walla in 1858; that he and Timoochin's daughter

were living together as man and wife, and that a boy was born as the issue of such relations, who was named William McBean; that as near as he could tell the parties lived together about a year; that the woman afterwards lived with several different men as their wife; and that she was not reputed to be a lewd or immoral woman. Thomas B. Beall testifies that he became acquainted with John McBean in the fall of 1857; that he was then acting as Indian interpreter in the service of the United States government, and was married, but his wife was living at Alpowai with her father, the Indian chief Timoochin, and her mother, Tema; that in the spring of 1858, having obtained a leave of absence from Colonel Steptoe, he went after her, and brought her home; that they lived in a house back of the commanding officer's quarters, and continued so to live until some time in July; that he saw them and their child, William McBean, frequently, and that the child was born some time in the fall of 1857; that the parties lived together something over a year, and were generally reputed to be husband and wife; that the woman subsequently lived with several other men as their wife; that she lived with John Silcott in 1866, and was not considered an immoral woman. Catherine Jordal testifies that John McBean was married to Jane Timoochin four or five years after the Cayuse War, by Father Mesplie, a Catholic Priest, at the house of John's father and mother; that she was present at the wedding, and witnessed the ceremony; that John's mother and two of his sisters were also present; and that she was seventeen years of age at the time. She relates that Father Mesplie remonstrated with John at the time for living with the woman without being married as required by the rites of the Catholic Church. Joe La Rocque testifies that John went down to The Dalles; that Timoochin's crowd went down there also, and that he and Timoochin's daughter

were married at the church while there by Father Mesplie; that he was not present at the church, but he saw the old folks when they went down to see him married; and that they were not married at Walla Walla. This was before the end of the Cayuse War, which occurred in the years 1855 and 1856. Jane McBean, John's mother, testifies that John was never married to the Timoochin woman, but that some time subsequent to the Cayuse War he was married to Tintinnitz's daughter (about this there is some confusion whether the marriage was to her or to Lalouskin's sister) at her home, and by the Catholic Priest, Father Mesplie; that Jane Timoochin and her mother brought the child Willie McBean to their place shortly after the war, when he was just learning to walk, and left him there; and that he remained with them and was supported by them until he became big enough to travel, when he went away.

Mrs. Mary La Favre testifies that she is a sister of John McBean; that she was at home when John and Father Mesplie were there; that Father Mesplie remonstrated with John for living with Jane Timoochin without being married to her by a priest, and that John said he did not want to marry her, because she would not stay with him, and finally told the priest that he would not marry her; that Father Mesplie never at any time, to her knowledge, performed the ceremony for the marriage of John McBean, her brother, and Timoochin's daughter. She further testifies that John was married to Tintinnitz's daughter about two years after the war, at the house of her father and mother, and that Father Mesplie officiated in the ceremony; that the first woman he took was Timoochin's daughter; that he stayed with her a little over a year; that she was called John's wife, but he was never married to her, so far as she knew. Susan Gagon testifies that John got a woman at The Dalles named

Jane Timoochin, and brought her to Walla Walla; that he was not married to her,—just lived with her; that John was later married to Tintinnitz's daughter at Mrs. McBean's house, and that Father Mesplie came from The Dalles to marry them; that John and Timoochin's daughter were married Indian fashion; that they separated, and she went back to her folks at Lapwai or Alpowai.

Without particularizing further, it is sufficient to state that John was subsequently married to Lalouskin's sister, and then to Spelilla's sister, in each instance by a Catholic Priest, and subsequent to the decease of his former wife; that it was a tenet of the Catholic Church, of which John was a member, that the priest should not officiate when one of the contracting parties had a spouse living, whether divorced or not. There is much conflict in the testimony touching the Indian custom of marriage and divorce, one notion or idea being that the Indians purchased their wives; that is to say, that the parents of the young people who were desirous of entering into the marital union would agree among themselves upon the amount of the stipend to be paid to the girl's parents by those of the young man, and when this was arranged, and the stipend paid, the contracting parties assumed the marital relation. Either party was at liberty to abandon the other, and such was the manner of their divorcement. The other is that they simply assumed the marital relation and cohabited as man and wife without previous contract or ceremony; that such relations continued at the pleasure of either party to the union; and that a voluntary separation constituted a divorcement entitling either to enter into new relations with another. Aside from this, there is much loose testimony to the effect that these parties lived together as man and wife for a space of time ranging from one to six or seven years; that

Jane Timoochin was reputed to be and generally known as John's wife; that he recognized and treated her as such, and admitted to sundry persons that she was his wife.

Because of the great divergency in the testimony, it is utterly impossible to determine the exact history of the affair which forms the basis of this controversy. It is probable, and more so than any other theory that we are able to adopt, that John McBean, while in the employ of the government as interpreter, met Timoochin's daughter at The Dalles, and there began living with her, and continued the relation at Fort Walla Walla for a year or two. That he was never regularly married to the woman according to the rites of the Catholic Church is quite well established. It is related by one of the witnesses, Mrs. Jordal, that he was married at the house of his parents to this woman by Father Mesplie, a Catholic Priest who was then located at The Dalles, while another witness testifies that he was married at The Dalles, the same party officiating. The mother and sister of John both testify that no marriage ceremony ever took place at the house of John's parents between these people, but that Father Mesplie did officiate in a ceremony at their house uniting John and Tintinnitz's daughter in the bonds of matrimony. These witnesses fix the date of the event at about the same time that Mrs. Jordal swears that he was married to Timoochin's daughter. Mrs. Jordal was then seventeen years of age, and is more likely to be mistaken than John's mother and sister. Another circumstance which goes to bear out this idea is that by the rites of the Catholic Church it was not permissible for a Catholic to remarry while he had a wife living, and, as Father Mesplie performed the ceremony of marriage between John and Tintinnitz's daughter, he would most assuredly have had in mind the fact of any prior mar-

riage at which he officiated between John and another woman then living. The testimony touching the alleged marriage at The Dalles is so indefinite that no reliance can be placed upon it. The party so testifying says that he was not at the church in which they were married, but that he saw the old people going there, and the rumor was that John was to be married to this girl. So that, upon the whole, we have concluded that John was never married to Timoochin's daughter according to the rites of the Catholic Church.

2. Such being the case, the next inquiry is whether these parties were married according to the recognized and established Indian custom then in vogue with the tribe to which the parties, or one of them, belonged. As a general proposition, it is well settled that a marriage valid according to the law or custom of the place where it is contracted is valid everywhere: Story, Conf. Laws, § 113. And it is the adjudged policy of the law to treat the Indian tribes who adhere to their peculiar customs, as separate communities or distinct nationalities, with full and free authority to manage their own domestic affairs, and to pursue their own peculiar habits and customs, especially as it concerns the marriage relation. And this is so although their territory is located within the state lines, and the federal government manages their affairs through agencies designated for the purpose. Nor are they regarded as subject to the state laws: *Boyer v. Dively*, 58 Mo. 510, 529, citing *Morgan v. McGhee*, 5 Humph. 13, and *Wall v. Williams*, 11 Ala. 826. As broadly stated in *Kobogum v. Jackson Iron Co.* 76 Mich. 498 (43 N. W. 602): "The United States Supreme Court and the state courts have recognized as law that no state laws have any force over Indians in their tribal relations;" citing many authorities. So, it is said in *Earl v. Godley*, 42 Minn. 361, 362 (18 Am. St. Rep. 517, 44 N. W. 255):

“The general rule is that marriages valid by the laws of the country where they are entered into are binding here, though not solemnized in accordance with the provisions of our laws; and the same rule must be adopted in relation to these Indian marriages, where the tribal relations still exist.” The rule was applied in *Johnson v. Johnson*, 30 Mo. 72 (77 Am. Dec. 598), where the marriage relation was assumed in Indian territory, outside of the limits of a state, by a white man and an Indian woman according to the tribal customs of the tribe to which she belonged; and again in *Morgan v. McGhee*, 5 Humph. 13, where the marriage was between a white man and a half-blood Cherokee upon Indian territory situate within the limits of a state. From these authorities it would seem that where the marriage is between members of the tribe wholly, or between white persons and members of the tribe, conforming to tribal customs, the union will be recognized as constituting a valid marriage in the state and federal courts. If valid everywhere, it follows as a logical sequence that the offspring of the contracting parties will take from them by the rules of inheritance in vogue in the state or country of their adoption.

At the time of the alleged marriage the Territory of Washington had been set apart by congress and provided with a form of government, but some of the Indian tribes, yet maintaining their distinct tribal customs, among whom may be designated the Cayuses, Walla Wallas, Umatillas, and Nez Perces, still occupied, without relinquishment of the Indian title, a large portion of the territory, which included Fort Walla Walla within its boundaries. Whatever testimony has been introduced touching the marriage custom then prevailing is not confined to any one of the tribes named, and we assume that whatever the custom was it prevailed alike among

all these tribes. Timoochin's daughter was a Nez Perce, but John McBean, although having Indian blood, had no tribal affiliations until he was adopted by the Umatillas, as above stated.

The evidence has impressed us that the prevalent marriage custom was the one which has for its basis the purchase of the wife by the relatives of the intended husband, especially where it concerns the marriage of young persons. We will briefly state our reasons for this conclusion, without attempting to dilate largely upon the evidence. Mrs. Woodard testifies, when asked touching her knowledge of the custom, that the Indians who were under the influence of the priest generally married according to the rites of the Catholic Church, and the "others bought their women;" and J. W. Gay, who was conversant with the Indian habits and customs, says: "My understanding of the Indian rules of marriage is this: If I had a son, and another Indian had a daughter, and my son wanted that daughter, the fathers of the two parties would meet and set a price on her, and if I could raise the means to buy that daughter from the other Indian my son would get her, and if not he could not get her. If he stole her, she would be taken back." This is a crude, but it is the most intelligent, explanation made in the record of the custom, and it is otherwise distinctly corroborated. Other witnesses, however, testify in a general way that the marital relations were consummated by the mere cohabitation of the sexes, which continued at the pleasure of either spouse; but it cannot be said that this latter alleged custom has been substantiated by the evidence.

3. There is no direct proof that John McBean and Timoochin's daughter were ever married in accordance with the custom prevailing; but it is contended that the fact, which was undoubtedly proven, that these parties lived

together and cohabited as man and wife is presumptive evidence of a lawful marriage. This would be true if not for the further fact that the proofs indicate that the relations between these people were meretricious from their inception. Several witnesses testify that a number of Indian women stayed about the garrison, and that white men in the employ of the government lived with them temporarily, but with no intention of marrying them. The testimony shows no more than this touching the relations that existed between John McBean and this Indian woman. Where parties have been living together and cohabiting as man and wife, and were reputed to be such in the community where they lived, and the husband has represented the woman to be his wife, there is a presumption that they were in fact lawfully married; but this presumption does not obtain where there is casual commerce between the sexes without intent upon the part of either to consummate a marital union. Promiscuous temporary intercourse has never been recognized as constituting marriage. It is said in *Lawson's Rights and Remedies* (vol. 2, § 711) that a marriage "will not be presumed even where, for convenience, the parties hold themselves out as man and wife before third persons, provided their cohabitation has the elements of a purely meretricious relation."

As we have seen, John McBean fell in company with Jane Timoochin at The Dalles while he was interpreter for the government. He was very young at the time, and the girl was not older than he. They were next heard of at Fort Walla Walla, when they are found to be living together in a tent which he had procured from the quartermaster for temporary use. This relation did not continue for more than a year or two, at most, and while the parties may have been reputed to be man and wife, and John McBean may have made admissions to the effect that this

woman was his wife, yet we cannot find from the testimony that he intended to form any such relations with her. Whatever relations he had with her were temporary, and it is very probable were not intended by either as the consummation of a marriage between them in any form, either in pursuance of the Indian custom or of the rites of a more modern civilization. The child was not born at the place of their residence, but at Alpawai. There is some testimony that McBean went to Alpawai to bring the mother and child home to his habitation, but the better view is that Timoochin's daughter and her mother brought the child to the home of John McBean's father and mother without his concurrence, and left it there to be reared by them. It is not seriously denied that the child is the offspring of the temporary intercourse between these parties, but it is very apparent that such relations do not constitute a marital union, even according to the custom of the Indians shown to be then prevailing, and therefore the child has no inheritable blood by which he would be entitled to the real estate of the father.

4. It is contended that, it having been shown that William McBean is the child of John McBean, the plaintiff would inherit from the grandfather by virtue of the act of congress of February 28, 1891 (Supp. Rev. St. U. S. p. 898, § 5), which provides as follows: "That for the purpose of determining the descent of land to the heirs of any deceased Indian under the provisions of the fifth section of said act, whenever any male and female Indian shall have cohabited together as husband and wife according to the custom and manner of Indian life, the issue of such cohabitation shall be, for the purpose aforesaid, taken and deemed to be the legitimate issue of the Indians so living together, and every Indian child, otherwise illegitimate, shall for such purpose be taken and deemed to be the legitimate issue of the father of

such child." Section 5 of the original act, which was "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the territories over the Indians, and for other purposes," adopted February 8, 1887 (24 Stat. 388), provided as follows: "That the law of descent and partition in force in the state or territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; and the laws of the State of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian Territory which may be allotted in severalty under the provisions of this act." The act of 1891 is an amendment of this original act. As will be seen by the title, the original act is a general one applying to the Indians upon the various reservations. It was enacted and became a law subsequent to the act providing for the allotment of lands upon the Umatilla Indian Reservation. That act was adopted March 3, 1885, and it was enacted thereby, among other things, "that the law of alienation and descent in force in the State of Oregon shall apply thereto after patents have been executed, except as herein otherwise provided." The act of 1885 was special in its nature, affecting none but the Umatilla Reservation and the confederated tribes inhabiting the same. While the act of 1887 was general in its purpose, it seems there was no intention of extending its provisions to the Umatilla Reservation and the Indians concerned. The allotments are made upon an entirely different basis, and the acts are otherwise incongruous, so that the general act could not well supersede the special without repealing it, and no such intention is made apparent from the terms of the general act. The clause in the latter act touching inheritance and partition, there-

fore, did not supersede the provisions touching the same subject in the special act, and it logically follows that the amendment of 1891 to the general act did not affect the special act. The laws of descent within this state are therefore applicable to the present controversy, and not those denoted by the acts of congress of 1887 and 1891. The plaintiff cannot, therefore, inherit through her father the property of her grandfather John McBean. These considerations affirm the decree of the court below, and it is so ordered.

AFFIRMED.

Decided 11 June, 1900.

LEW v. LUCAS.

[61 Pac. 344.]

APPEAL—VERITY OF RECORD.

1. On appeal it will be conclusively presumed that the transcript correctly states what actually occurred.*

CONTINUANCE—DISCRETION—ABSENT WITNESS.

2. The appellate court will not reverse a case for the refusal of the trial court to grant a continuance at the trial to secure the attendance of an absent witness, where the opposite party admitted that the witness would, if present, testify as claimed, and that such testimony should be considered as actually given, both because that matter rests in the discretion of the court and because the statute gives the opposite party the right to insist on a trial under such circumstances.

SUFFICIENCY OF VERDICT—JUDGMENT.

3. Where defendant admitted part of the debt claimed by plaintiff a verdict for defendant is properly construed to be a finding for defendant as to all the plaintiff's claim except the amount conceded. In such a case the verdict may be considered as if amended to conform to the evident intention of the jury, and judgment given accordingly: *Jacobs v. Oren*, 30 Or. 503, distinguished.

From Grant: MORTON D. CLIFFORD, Judge.

This is a case brought in a justice's court by Lew & Sprague against N. A. Lucas to recover \$52.25 for goods, wares, and merchandise alleged to have been sold and

*NOTE.—On this point see, also, *State v. McCaffrey*, 26 Or. 570.—REPORTER.

delivered to the defendant by the plaintiffs between the thirtieth of August and third of September, 1898, no part of which has been paid. The answer denies the allegations of the complaint, except as thereafter admitted, and, for a further and separate defense, avers, in substance, that in August, 1898, the defendant ordered from the plaintiffs goods, wares, and merchandise of the value and amount of \$52.25, upon the express condition that they were to be delivered at the house of defendant, in Canyon City, on or before the first day of October; that plaintiffs have failed, neglected, and refused to deliver the goods according to the contract, and failed, neglected, and refused to deliver the same to defendant at any time or place; and that defendant has not received any part of such goods, except to the value of \$11.75, which amount he tendered to the plaintiffs prior to the commencement of the action, and deposits in court for the plaintiffs with his answer. The reply puts in issue the material allegations of the answer, except the alleged tender and deposit in court. The plaintiffs had judgment in the justice's court for the amount demanded in their complaint, and defendant appealed to the circuit court; filing his transcript on the twentieth day of November, the first day of the next succeeding term thereof. Thereafter such cause was postponed from day to day until the twenty-fifth of November, when it was called for trial, whereupon counsel for plaintiffs filed a motion for a continuance on account of the absence of his client and of a witness, supported by his affidavit, in which he stated the evidence which he expected to obtain. The defendant admits that the witnesses would so testify. The motion for continuance was overruled, and the cause proceeded for trial, resulting in a verdict, which, omitting the formal parts, is as follows: "We, the jury in the above-entitled cause, find our verdict

for the defendant." On the same day, counsel for plaintiffs filed a motion to set aside the verdict, and for a new trial, on the ground of "insufficiency of the evidence to justify the verdict, and that it is against the law." Before this motion was disposed of, the defendant filed an offer to allow plaintiffs judgment for \$11.75, the amount admitted in his answer to be due, or, in lieu of such judgment, to permit them to take and withdraw such sum from the hands of the clerk. Thereafter, and on November 28, the cause coming on to be heard upon the motion of plaintiffs to set aside the verdict, and of defendant tendering plaintiffs a judgment for \$11.75, the amount admitted by the answer to be due them, the motion to set aside the verdict was overruled and denied, and a judgment entered in favor of the plaintiffs for \$11.75, and in favor of the defendant for costs and disbursements. From this judgment the plaintiffs appeal to this court, assigning as error (1) the ruling of the trial court in denying their motion for a continuance; (2) in receiving and filing the verdict returned by the jury, and in not setting it aside on its own motion; (3) in trying the cause without the jurors having been sworn before being examined as to their qualification to sit as jurors, and without being sworn to try the cause; and (4) in overruling the plaintiffs' motion to set aside the verdict, and entering judgment in favor of the plaintiffs for \$11.75, and in favor of the defendant for costs and disbursements.

AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. W. F. Butcher*.

For respondent there was a brief over the name of *Stillman, Leedy & Pierce*, with an oral argument by *Mr. A. D. Stillman*.

MR. JUSTICE BEAN, after stating the facts, delivered the opinion of the court.

1. It is claimed that at the time the appeal was taken the record of the court below did not show any disposition of the motion for a continuance, or that the jury impaneled to try the cause, and before which it was tried, was sworn as by law required. But the transcript, as filed, shows that the motion for a continuance was denied because the defendant admitted the testimony set out in the affidavit, and that the jury was properly sworn; and this is conclusive upon these questions.

2. An application for a continuance is addressed to the sound discretion of the trial court, and its action thereon will not be reviewed, except for a clear abuse of discretion: *State v. Fiester*, 32 Or. 254, 267 (50 Pac. 561). And, besides, the statute provides that "the court may require the moving party to state upon affidavit the evidence which he expects to obtain, and if the adverse party thereupon admit that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial shall not be postponed:" Hill's Ann. Laws, § 179. So that, for either of these reasons, there was no error in denying the application for a continuance.

3. In view of the record, the only remaining question is whether the verdict as returned by the jury is sufficient to support the judgment. The general rule is that a verdict must comprehend the whole issue submitted to the jury, or a judgment entered thereon will be reversed: *Wood v. Maguire*, 17 Ga. 361 (63 Am. Dec. 246). But it is not necessary that it should be expressed in any particular language. It is sufficient, however informal it may be, when it covers the whole issue, and shows what the finding of the jury really is upon the issue presented

to it. A verdict should be construed liberally, and not under the technical rules of construction which are applicable to pleadings; and, if the meaning of the jury can be ascertained and the point in issue can be concluded from its verdict, the court will, however informally it may be expressed, mold it into form, and make it serve: 28 Am. & Eng. Enc. Law (1 ed.), 370; 2 Thompson, Trials, § 2642; 2 Elliott, Gen. Prac. § 947; 20 Cent. Law J. (f) 147; 33 Cent. Law J. 358; *Middleton v. Quigley*, 12 N. J. Law, 352; *Cohn v. Scheuer*, 115 Pa. St. 178 (8 Atl. 421); *Humphreys v. Borough of Woodstown*, 48 N. J. Law, 588 (7 Atl. 301); *Phillips v. Kent*, 23 N. J. Law, 155. Applying these rules to the case at bar, we are of the opinion that the verdict is sufficient. It necessarily settles and determines the only contested issue between the parties, and there is no difficulty in ascertaining what the jury intended. The only point in dispute was whether the defendant was indebted to the plaintiffs for goods, wares, and merchandise sold, in excess of the \$11.75 admitted by the answer, and which had been tendered to the plaintiffs prior to the commencement of the action. To this issue the evidence was directed, and it is covered and concluded by the finding of the jury in favor of the defendant; and we think the court was fully justified in proceeding as if the verdict had been amended to conform to the manifest intention of the jury, and in entering judgment accordingly. In *Jacobs v. Oren*, 30 Or. 593 (48 Pac. 431), which is relied upon by the plaintiffs, and which in many of its features is similar to the case now in hand, the question decided is that it was not error for the court upon its own motion to set aside a verdict of a jury and grant a new trial, when it had found contrary to the admissions in the answer. But in this case the court did not set aside the verdict, but treated it as amended to conform to the evident intention of the jury, and hence the case

cited is not in point. It follows from these views that the judgment of the court below must be affirmed, and it is so ordered.

AFFIRMED.

Argued 27 June; decided 13 August, 1900.

NON-SHE-PO v. WA-WIN-TA.

[62 Pac. 15.]

INDIAN LANDS—LAW OF DESCENT.

1. The only rule for determining the descent of real property belonging to an allottee of land within the Umatilla Indian Reservation is that provided by the statutes of Oregon.

REQUISITES OF ADOPTION.

2. Adoption always requires some special proceeding more than the mere physical care of the person adopted—in Oregon a decree of court in the manner provided by statute* is necessary to give the child an inheritable quality: *Ferguson v. Jones*, 17 Or. 204, cited.

ADOPTION—INDIAN CUSTOM.

3. An adoption of another's child can never be accomplished by merely caring for and rearing it, even if such be the custom of the community or tribe or nation where the persons lived.

From Umatilla: STEPHEN A. LOWELL, Judge.

Suit by Non-she-po against Wa-win-ta-la-yeckt to determine an adverse claim to realty in which defendant prevailed.

AFFIRMED.

For appellant there was a brief over the name of *Stillman & Pierce*, with an oral argument by *Mr. A. D. Stillman*.

For respondents there was a brief and an oral argument by *Mr. Thos. G. Hailey*.

*NOTE.—The law in Oregon on this subject is found in Sections 2937 to and including 2944, Hill's Ann. Laws.—REPORTER.

MR. CHIEF JUSTICE BEAN delivered the opinion.

1. This is an appeal from a decree dismissing a complaint in a suit, under section 504 of the statute (Hill's Ann. Laws), to determine an adverse claim to real estate. The parties are Indian women belonging to the Umatilla and Walla Walla tribes, respectively; both residing upon the Umatilla Reservation. The real property in controversy is a forty-acre tract of such reservation, in possession of the plaintiff, allotted, under the act of March 3, 1885 (23 Stat. c. 319), to one George Pearson, who died prior to the commencement of the suit, leaving no lineal descendants, and neither a wife nor a father. Defendant is the mother, and plaintiff the grandmother, of Pearson. The complaint alleges that in the year 1879, when Pearson was about four months old, he was abandoned by his mother and left to perish; that thereupon he was taken and cared for by the plaintiff until his death; that, according to an immemorial custom among the tribes of Indians residing on the reservation, whenever an infant is abandoned by its parent or parents the person caring for it becomes its adopted parent, and thereafter has and enjoys all the rights and privileges which would have been enjoyed and possessed by its parent or parents if it had not been so abandoned, and such infant becomes the adopted child of the person so caring for it, and enjoys all the rights and privileges of a natural child; that by reason of these facts the infant, Pearson, became to all intents and purposes the son of the plaintiff, and the defendant thereby abandoned and forever surrendered all rights and privileges of heirship she might otherwise have had by reason of being the mother of such child. The plaintiff therefore claims to be the heir of Pearson, and as such entitled to inherit the forty acres of land allotted to him under the act of congress, while the de-

fendant claims that she is entitled to the property as his natural mother.

The act of congress referred to provides for the allotment in severalty of the land comprised within the Umatilla Reservation to the Indians residing thereon, and that after such allotment "the President shall cause patents to issue to all persons to whom allotments of lands shall be made under the provisions of this act, which shall be of the legal effect and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State of Oregon, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of such trust and free of all charge or incumbrance whatsoever." It thus appears that, under this statute, in case of the death of an allottee the title of the land allotted to him shall descend to his heirs "according to the laws of the State of Oregon," so that the question of heirship must be determined from the statutes of this state.

2. The right of the plaintiff to recover depends upon whether, under the custom alleged in the complaint, she became the legally adopted mother and heir of the infant, Pearson, by reason of his mother's abandonment and her subsequent nurture and care of him. Now, adoption is the taking into one's family the child of another as son and heir, and conferring on it a title to the rights and privileges of such. It is a right purely statutory, and was unknown to the common law. It was, however, a feature of the Roman law, but even according to that system some special authority of law was necessary to constitute an adoption: *Ballard v.*

Ward, 89 Pa. St. 358. It never was in the power of an individual, either by the common law of England or the Roman law, to adopt the child of another at his own volition, or by the consent of its parents: *Abney v. De Loach*, 84 Ala. 393 (4 South. 757). There must be some special authority for such a proceeding. In this state it requires the decree of a competent court, made in conformity to the provisions of the statute, to confer on a child the capacity or quality of heir to a stranger: *Furgeson v. Jones*, 17 Or. 204 (20 Pac. 842, 3 L. R. A. 620).

3. In the matter of marriage between Indians, tribal customs have been recognized by the courts because they were in conformity to natural rights. But the right of adoption is contrary to natural law, and we have been unable to find any case reported where adoption by custom has been sanctioned or maintained. It follows from these views that the decree of the court below must be affirmed, and it is so ordered. **AFFIRMED.**

Argued 24 April; decided 12 May, 1900.

SALZGEBER v. MICKEL.

[60 Pac. 1009.]

LANDLORD AND TENANT—PLEADING EVICTION.

1. A complaint in an action by a tenant against his landlord for being wrongfully evicted from rented lands, which states that under the lease the landlord had a right to terminate the occupation on notice whenever he desired to use the lands for some purpose other than that for which they had been rented; that the landlord gave such notice, and that the tenant peaceably surrendered possession in consequence thereof; that the said notice was given in bad faith and for the purpose of evicting plaintiff, and that the landlord had continued to use the lands for the same purpose for which they had been rented, states a cause of action for wrongful eviction as against a motion for judgment on the pleadings at the trial.

EVICTION—DAMAGES RECOVERABLE UNDER GENERAL ALLEGATION.

2. Where an action is brought by a tenant against his former landlord for an eviction, based on the wrongful action and bad faith of the landlord, the natural and approximate damages resulting from the breach of the lease may be shown under an allegation of general damages.

BREACH OF CONTRACT—DAMAGES—WHEN ACTION MAY BE BROUGHT.

3. Where the breach of a lease is total, an action for both present and prospective damages may be maintained without waiting the expiration of the time required for the full performance of the contract.

From Marion : GEO. H. BURNETT, Judge.

This is an action by John Salzgeber against N. Mickel and wife for damages for the wrongful eviction of plaintiff from certain leased premises to be used for the production of hops. The defendants, by a written agreement executed March 31, 1896, leased to plaintiff a hop field, situated upon their farm, for the term of five years, ending December 1, 1900. The agreement contains the following stipulation : " First party is entitled to desist in farming the said hop field as a hop field, but if N. Mickel and wife, party of the first part, wishes to desist, are obliged to give notice to John Salzgeber, party of the second part, from the last day of picking till ten (10) days after the last day of picking each year, but are not allowed to rent said hop field as a hop field to any other party or parties, nor farm it himself as a hop field, during the above-specified years." The action is based upon a breach of this stipulation, the averments touching which are substantially as follows : That on or about the first day of October, 1896, the defendants notified plaintiff, as by the terms of said agreement required, that they desired to desist and discontinue farming the premises as a hop field, and demanded and required plaintiff to quit and surrender up to them the said premises, and at the same time further notified the plaintiff that they thereby terminated said agreement and lease in pursuance of said stipulation ; that plaintiff, relying upon and believing said notice to have been given in good faith, and believing that defendants desired to desist and discontinue farming said premises as a hop field, as represented by them in said notice, and as they had a right to do under the terms of the agreement, surrendered to the defendants, who then and there took, and ever since have retained, possession of the said premises, although plaintiff duly

demanded a return thereof to him immediately upon discovering that they did not intend to discontinue farming the same as a hop field; that said notice so given plaintiff by defendants was not given in good faith or with an honest intent; that said defendants did not intend to desist, and have not desisted or discontinued, farming said premises as a hop field, but simulated said purpose only, and gave said notice for the sole purpose of evicting and ousting the plaintiff, and repossessing themselves of said premises four years before the lease thereof to plaintiff would otherwise terminate. The issues having been made up, a jury was impaneled, and, when plaintiff endeavored to offer proof showing the breach of the contract in the particular alleged, the court refused to admit it, and gave judgment for defendants upon the pleadings, upon the ground that the complaint does not state facts sufficient to constitute a cause of action. From this judgment the plaintiff appeals.

REVERSED.

For appellant there was a brief over the names of *Arthur C. Emmons*, *John A. Carson*, and *Adolf Schutz*, with an oral argument by *Mr. Emmons*.

For respondents there was a brief over the name of *Holmes & Kellogg*, with an oral argument by *Mr. William H. Holmes*.

MR. CHIEF JUSTICE WOLVERTON, after stating the facts, delivered the opinion of the court.

1. The stipulation contains sufficient of the substance of the agreement, without further reference thereto, to indicate the purpose of the parties, viz., that, if the premises leased were to be utilized continuously for the production of hops, plaintiff should have the use thereof until the end of his term. But it was left optional with the

lessors whether the premises should continue to be used for that specific purpose ; so a method was provided for terminating the lease, and for their re-entering or regaining possession in case they concluded that the hop culture should cease thereon. So long, however, as the premises were to be used for the culture of hops, the lessors were without authority to put an end to the lease, or to dispossess the plaintiff, who, under such condition, was entitled to possession and use until the end of his term. Now, the effect of the allegations of the complaint is that the defendants wrongfully represented to plaintiff that they desired to discontinue the use of the premises for the culture of hops, when, in truth and in fact, they intended to continue using them for such purpose ; that their avowed desire to the contrary was not real, but simulated, and a mere pretense, made with a view of regaining possession of the premises and terminating the lease in violation of the stipulation ; that plaintiff, relying upon the supposed good faith of defendants' representations, surrendered possession in obedience to their notification ; and that defendants did not in fact discontinue the production of hops, but have since utilized the premises for that purpose. There is here a statement of a breach of the condition of the agreement upon the part of the defendants, because they have evicted the plaintiff, contrary to the letter, as well as the spirit, of the express stipulation. If it be said that the breach is not well assigned, it must be conceded that, at the worst, the complaint states a good cause imperfectly ; and, judgment having been given upon the pleadings after the issues had been fully formulated, all intendments must be taken in favor of the sufficiency thereof.

2. The question is therefore resolved into whether damages may be predicated upon the breach assigned. If so, the complaint is sufficient. The rule clearly applica-

ble here is stated by Mr. Sutherland as follows : "Where a lessor knows, or is chargeable with notice, of such defect of his title that he cannot assure a lessee quiet enjoyment for the term which he assumes to grant ; where he refuses, in violation of his agreement, to give a lease, or possession pursuant thereto, having the ability to fulfill, as well as where he evicts his tenant,—he is chargeable with full damages for compensation : " 3 Sutherland, Dam. (2 ed.) 1973, 1974. Mr. Chief Justice EARL, in *Mack v. Patchin*, 42 N. Y. 167 (1 Am. Rep. 506), treats the rule as an exception, or, rather, as not falling within the general rule promulgated in such cases. The action was for a breach of the covenant for quiet enjoyment implied in a lease, where the eviction was occasioned through fault of the lessor. He says : "If the vendor is guilty of fraud, or can convey, but will not, either from perverseness or to secure a better bargain, or if he has covenanted to convey, when he knew he had no authority to contract to convey, or where it is in his power to remedy a defect in his title, and he refuses or neglects to do so, or when he refuses to incur expenses which would enable him to fulfill his contract,—in all these cases the vendor or lessor is liable to the vendee or lessee for the loss of the bargain, under rules analogous to those applied in the sales of personal property." So it was held that, the lessee having been evicted by reason of the prior mortgage covering the premises upon which the lease was given, and the lessor having wrongfully given the lease, knowing the mortgage was there, and failing to protect the lease against the mortgage, the lessor was liable for damages under the rule thus indicated by the learned jurist. Other cases go further, and apply the rule that indemnity constitutes the proper measure of damages, whether a wrongful act or bad motives can be imputed to the lessor or not : *Snodgrass v. Reynolds*, 79 Ala. 452 (58

Am. Rep. 601). We need have but little concern, however, whether the rule is based upon the wrongful conduct and bad faith of the lessor, or not, as it is sufficient for this case to know it exists, when bad faith attends the transactions; for the defendants herein are charged by the averments of the complaint with deceit and want of good faith in procuring the surrender and relinquishment of the leased premises by the plaintiff. The damages recoverable are such as are natural and approximate, and are ordinarily measured by the difference between the rent paid and the actual value of the premises for the unexpired term: 3 Sutherland, Dam. (2 ed.) 1974. In further support of these rules and principles, see *Alexander v. Bishop*, 59 Iowa, 572 (13 N. W. 714); *Dodds v. Hakes*, 114 N. Y. 260 (21 N. E. 398); *Townsend v. Nickerson Wharf Co.* 117 Mass. 501; *Rhodes v. Baird*, 16 Ohio St. 573; *Greene v. Williams*, 45 Ill. 206; *Dobbins v. Duquid*, 65 Ill. 464; *Taylor v. Bradley*, 39 N. Y. 129 (100 Am. Dec. 415); *Conlon v. McGraw*, 66 Mich. 194 (33 N. W. 388). Plaintiff has alleged generally that he is damaged by reason of the breach in the sum of \$500. Under this allegation, he would be entitled to recover whatever sum he might be able to show that he was damaged under the rule. There is a further allegation of \$200 damages for labor and money expended, etc. Of this we must not be understood to speak at the present time, because there was no question presented respecting it.

3. Again, it is contended that the action could not be maintained until the full term of the lease had expired, because the amount of damages is not otherwise ascertainable. But such is not the rule. In case of a contract extending through a considerable period of time, if the breach is total, a recovery may be had of all damages, both present and prospective, and it is not necessary to await the time for full performance. Actions may be

instituted and sustained at once upon the breach : 8 Am. & Eng. Enc. Law (2 ed.), 682 ; *Remelee v. Hall*, 31 Vt. 582 (76 Am. Dec. 140) ; *Hale v. Trout*, 35 Cal. 229 ; *American Mfg. Co. v. Klarquist*, 47 Minn. 344 (50 N. W. 243) ; *Taylor v. Bradley*, 39 N. Y. 129 (100 Am. Dec. 415) ; *Conlon v. McGraw*, 66 Mich. 194 (33 N. W. 388). The acts of the defendants, as shown by the averments of the complaint, amount to a total breach of their stipulation, as they have put an end absolutely to the agreement under which the parties were acting ; and, under the authorities above alluded to, the action was maintainable from the time the breach occurred. These considerations reverse the judgment of the court below, and the cause will be remanded for such further proceedings as may seem proper in the premises.

REVERSED.

Decided 23 July, 1900.

McMANUS v. SMITH.

[61 Pac. 844.]

NONTRADING PARTNERSHIP—IMPLIED AUTHORITY OF PARTNER.

1. A member of a nontrading partnership has no implied authority to give a note in the firm name in a transaction outside of the apparent and actual scope of the partnership business, and persons dealing with such a firm in such matters must affirmatively show the authority of the partner with whom they dealt.

DISSOLUTION OF PARTNERSHIP—PAYMENT OF DEBTS.

2. In closing up a partnership the court should not direct the payment of a personal debt of one of the partners out of the fund arising from the sale of the partnership property.

PAYMENT OF DEBT OF PARTNERSHIP.

3. Where it was mutually agreed between partners that the net profits of their business should be forthwith applied to the payment of a firm debt not yet due, the receiver should be directed to pay it out of the funds arising from the sale of the partnership property.

From Umatilla : STEPHEN A. LOWELL, Judge.

This is a suit by J. P. McManus against D. G. Smith and others to dissolve a partnership, to set aside a chattel mortgage of the partnership property, and for an account-

ing. The transcript shows that on January 9, 1899, the plaintiff, J. P. McManus, in consideration of \$400 in money and a promissory note for \$500 executed by the defendant D. G. Smith, sold and delivered to the latter an undivided one-half interest in a newspaper published in Pendleton, Oregon, known as the Pendleton Republican, including the machinery, presses, type, and material belonging thereto, whereupon a partnership was entered into between the parties, under the name of the Republican Co., for the publication of said newspaper, and it was stipulated that neither party should mortgage his interest in said property without the consent of the other; that McManus would pay the outstanding debts, and on the first of each month the net profits accruing from the business should be divided equally, and if McManus should, during any month, draw out more than his share of such profits, the excess should be credited upon Smith's note. McManus, at the time the partnership was formed, was indebted to several persons, and, to obtain the money with which to pay them, he and Smith borrowed from Mary A. Murphy \$600, giving a note therefor, payable in two years, with interest at five per cent. per annum, and assigned to her, as collateral security, Smith's \$500 note. On February 21, 1899, Smith gave the defendant Clarence Miller his promissory note for \$1,700, payable one day thereafter, and gave him a chattel mortgage on all said partnership property as security therefor, which mortgage was filed in the office of the County Clerk of Umatilla County on the day it was executed. Three days thereafter McManus, having discovered that said mortgage had been given and filed, instituted this suit, alleging that Smith conspired with Miller, to whom he is related, to so manage the partnership business as to depreciate the value of the property thereof and to defraud plaintiff and the partnership creditors, and that said note and

mortgage were without consideration, and accepted with knowledge of said partnership agreement, by Miller, who threatens to foreclose his pretended security.

McManus having been the editor of the Pendleton Republican, the court appointed him, upon the filing of the complaint, receiver of the partnership property, which enabled him to continue the publication of said newspaper. The defendants Smith and Miller filed separate answers, denying the material allegations of the complaint, and averring that said note and mortgage were executed as evidences of indebtedness upon which Miller paid the Republican Co. the sum of \$1,700; and, the promissory note being due, and no payment having been made on account thereof, Miller prayed that said mortgage be foreclosed. Mary A. Murphy, having been permitted to become a party defendant, filed an answer denying the material allegations of the complaint, and averring that on January 9, 1899, McManus and Smith were partners and insolvent, and on that day, a suit having been brought against them, a receiver was appointed, who took possession of all their property; that, to secure the discharge of such receiver and to pay their debts, she loaned them the sum of \$600, under an agreement that they would not mortgage said property, and that the net proceeds arising from publishing said paper should be paid to her monthly, in pursuance of which agreement other and further articles of partnership were subscribed by McManus and Smith; and that the mortgage executed by the latter was without consideration, and executed for the purpose of defrauding the creditors of the Republican Co. Replies having put in issue the allegations of new matter in the answers, a trial was had, resulting in a decree as prayed for, and Smith and Miller appeal.

MODIFIED.

For appellants there was a brief over the names of *Thos. G. Hailey* and *Stillman & Pierce*, with an oral argument by *Mr. A. D. Stillman*.

For respondent there was a brief over the names of *James A. Fee* and *Carter & Raley*, with an oral argument by *Mr. Chas. H. Carter*.

MR. JUSTICE MOORE, after making the foregoing statement, delivered the opinion of the court.

It is alleged in the complaint that Smith and Miller are related, but that the degree of consanguinity was unknown to the plaintiff; and this averment is not denied in their answers, it being generally understood that they are half-brothers. Testimony was introduced at the trial tending to show that on January 9, 1899, McManus and Smith owed Miller \$50, which they paid him that day from the loan secured from Mary A. Murphy, and, having received that sum, it was all the money that he then possessed. If Miller loaned Smith any money, no part of it was used to pay the firm debts; for, after executing the chattel mortgage, Smith immediately left Pendleton, and two days thereafter wrote Miller the following letter:

“SPOKANE, Wash., Feby. 23, '99.

Dear Clarence:

I got here at five minutes past twelve Thursday night. I met with quite a loss with that money we got from you. I think I will come home Sunday or Monday. How is everything at Pendleton? There were snow and ice on the ground when I got here, and it began to snow yesterday about 5 P. M., and is still snowing hard at 11 o'clock to-day. I like Spokane very well, but I have little faith now in mining, although there is no doubt some are making good money of it.

Yours, truly,

D. G. SMITH.

Write me, gen. delivery, Spokane, Wash.”

Charles A. Maskrey, plaintiff's witness, testified, in substance, that about two weeks prior to the trial, in the absence of Miller, he had a conversation with Smith, who said that the proceedings adopted were not the result of his judgment, but they had been pursued on the advice of his attorneys to secure the money which he had paid.

The plaintiff and Mary A. Murphy having introduced their testimony and rested, Miller's counsel moved the court for a decree of nonsuit, so far as his answer sought a foreclosure of the chattel mortgage; neither Smith nor Miller having been called as witnesses, though present at the trial. It is contended by appellants' counsel that, the complaint having been predicated upon the ground of fraud, the burden was upon the plaintiff to prove such averments; but not having offered any testimony tending to show that the note and mortgage, copies of which were introduced in evidence, were executed without consideration, the defendants Smith and Miller were not required to introduce any testimony, the presumption that a promissory note was given for a sufficient consideration (Hill's Ann. Laws, § 776, subd. 21) supplying the necessary proof. Plaintiff's counsel insist, however, that the publication of a newspaper, the business in which the firm was engaged, being a nontrading partnership, neither partner had implied authority to execute in the name of the firm a promissory note or mortgage, and that, the defendant Miller having dealt with Smith in matters outside the scope of the usual partnership business, the burden was upon them, in order to render the firm liable, to show that Smith possessed special authority to execute in the name of the firm the note and mortgage in question, but not having done so, and a copy of the partnership agreement having been introduced in evidence, showing that neither partner, without

the other's consent, could mortgage his interest in the firm property, the said note and mortgage should be canceled.

1. The general rule is that each partner has implied authority to bind all the partners by his contracts entered into in the firm name with third persons who have no knowledge of any limitation of his apparent power, when such agreements relate to the performance of the business in which the firm is engaged: 17 Am. & Eng. Enc. Law (1 ed.), 987. When, however, a third person enters into a contract with a partner in the firm name, relating to a subject-matter outside of and beyond the scope of the firm's usual business, before such party can charge the firm he must show that the partner who assumed to act for all the partners possessed special authority so to consummate the agreement relied upon: Parsons, Partn. (4 ed.) § 85. A partner in a firm conducting a general commercial business has implied authority to enter into any contract in the name of the firm that usually pertains to the transactions in which such firm is engaged, and as a result of this principle he may sell the partnership property, incur debts, borrow money and execute promissory notes on account of the partnership. But a partner in a nontrading firm does not possess such general power, and has no authority, as a general rule, to contract debts or issue commercial paper; and a third party who has entered into such a contract, in order to hold the firm liable therefor, must affirmatively show that the partner who acts for the firm possessed the power which he assumed: 17 Am. & Eng. Enc. Law (1 ed.), 993. In *Pooley v. Whitmore*, 10 Heisk. 629 (27 Am. Rep. 733), it was held that a firm engaged in the publication of a newspaper at Memphis, Tennessee, was a nontrading partnership, and not liable to a *bona fide* holder, for value, and before maturity, of a promissory note made by one of the parties

for his own benefit, who indorsed the firm name thereon for his accommodation. In *Bays v. Conner*, 105 Ind. 415 (5 N. E. 18), a promissory note having been given by a partner in the name of the Central Printing Company, a firm of which he was a member, and it having appeared that said company was in no sense a trading or commercial partnership, it was held that one partner cannot, in the absence of express authority, bind the firm or his copartner by a note executed by him in the firm name, in a transaction wholly outside the apparent and actual scope of the partnership business, although it may appear that the consideration for the note was applied to the payment of a firm debt. The publication of the Pendleton Republican did not make the firm engaged therein a trading or commercial partnership, and, this being so, before Miller could establish the liability of the Republican Company the burden was upon him to show that Smith possessed authority to execute the note given to him. He was present at the trial, and might have made this proof if in his power, but he neglected the opportunity; and, having done so, no error was committed in decreeing a cancellation of the note and mortgage, for if the note was executed without authority, and fails on that account, the mortgage, which is but an incident of the note, must fail also.

2. The court, on March 13, 1899, appointed Lot Livermore joint receiver, who took possession of the partnership property, collected from various sources the sum of \$824.77, and paid out on account of expenses \$821.52; and having sold the newspaper, machinery, presses, type, etc., realizing therefrom the sum of \$950, he reported that he had on hand for distribution the sum of \$953.25, against which the following claims had been presented, to wit: Pendleton Republican, printing notice to creditors, \$5.00; Ed. Switzler, rent, \$100; H. N. Richmond Paper

Co., \$42.70; J. P. McManus, services as editor, \$200; First National Bank, note and interest, \$159.18; Charles A. Maskery, services, \$38; California Ink Co., \$17.15; Herald Engraving Co., \$6.90,—and that he was entitled to the sum of \$134, compensation as receiver. Objections having been made to various items in said report, the court disallowed the sum of \$124.40 paid to McManus, included in the account of expenses, refused to allow any sum for publishing the notice to creditors, cut down Switzler's bill for rent to \$45, and McManus' bill as editor to \$152, and approved the report in all other respects, directing Livermore to pay the respective claimants the several sums so found to be due them. The court also having found that McManus on January 10, 1899, paid Mary A. Murphy the sum of \$325, and that there was due on her note for \$600 the sum of \$280.80, directed the receiver to pay the same to her; thus leaving \$201.92 in the hands of the receiver, who was ordered to pay the costs of the suit, exclusive of the compensation of the receivers, paying the remainder equally to the plaintiff, J. P. McManus, and to the defendant, D. G. Smith. It is contended that the court erred in the allowance of many of these claims. The California Ink Co. on December 2, 1898, wrote the following letter to the Republican Company:

"We inclose herewith statement of your account. As this account is some five months past due, we have to-day drawn on you at three days for the amount of the account, \$17.15, and must ask you to honor the draft."

This letter has indorsed thereon a statement that "the above claim is correct, and remains unpaid.

"CALIFORNIA INK CO.,

"Per H. C. ANGELL.

"June 10, 1899.

"Subscribed and sworn to before me this 10th day of June, 1899.

LOT LIVERMORE,

"Notary Public for Oregon."

The partnership dissolved by the decree herein was not formed until January 9, 1899, and, McManus having agreed to pay all outstanding debts, it is evident that he, and not the firm, is chargeable with this item.

3. We have carefully examined all the other items to which objection was made, and find them correct, but the claim of Mary A. Murphy requires consideration. It will be remembered that she held McManus' note for \$600, payable in two years from January 9, 1899, upon which he paid the sum of \$325, and that she also held, as collateral security therefor, Smith's note given to McManus for \$500, evidencing a part of the consideration of his purchase, which was payable on or before two years from that date. The testimony shows that, notwithstanding these notes were not due, it was mutually agreed by all the parties that Mary A. Murphy should be paid monthly the net proceeds derived from the publication of the Pendleton Republican. The sale of the newspaper defeats the performance of this agreement, and, as the money on hand is sufficient to meet the payment of all claims against the firm and the partners thereof, no error was committed in directing the receiver to carry out the agreement of the parties. The amount so reported on hand will be increased by the sum allowed the California Ink Co., making the sum of \$219.07 to be distributed in the manner specified in the decree; but, before paying McManus the sum so due him, the receiver is directed to pay therefrom the sum of \$17.15 to the California Ink Co. The decree will therefore be modified as herein indicated.

MODIFIED.

Argued 16 October; decided 22 October, 1900.

MISER v. O'SHEA.

[62 Pac. 491.]

COUNTERCLAIM—MINES AND MINERALS.

1. Plaintiff brought an action for damages, and to enjoin defendants, who owned a placer mine just above plaintiff's, on the same creek, from flooding debris down on plaintiff's claim in the operation of defendants' mine. Defendants filed a counterclaim for damages occasioned by water being backed up on their claim in consequence of a dam built across the creek below defendants' mine by plaintiff. *Held*, that the counterclaim was properly struck out since such damages were in no way connected with the subject of the suit, as required by Section 393, Hill's Ann. Laws, but arose from an independent trespass.

TRESPASS AS A COUNTERCLAIM.

2. A trespass cannot be pleaded as a counterclaim or set-off against another trespass.

SHAM PLEADING.

3. Matter that is not obviously false or evidently pleaded in bad faith is not sham: *The Victorian*, 24 Or. 121, cited.

MINING CLAIM—WHEN STATUTE BEGINS TO RUN.

4. The statute of limitations does not run against the right to a mining claim until the issuance of the patent; in other words, there can be no holding adverse to the United States.

REVOCABILITY OF PAROL LICENSE—MINES.

5. In an action for damages occasioned by defendants flooding debris down on plaintiff's placer mine from defendants' mine, which was situated just above plaintiff's mine, on the same creek, defendants claimed to do so by virtue of a license from plaintiff, and alleged that on the strength of such license they had made valuable improvements on their own claim, but did not show that they paid anything for the license, or that they had not been repaid for their improvements by the operation of their own mine. *Held*, that the license was revocable, and did not constitute a defense to the action: *Hallock v. Switor*, 37 Or. 9, applied.

From Douglas: H. K. HANNA, Judge.

This is a suit by S. W. Miser to enjoin P. H. O'Shea and others from trespassing on certain real property. The transcript shows that the plaintiff is the owner of a placer mining claim in the Green Mountain mining district, Douglas County, Oregon, through which Starveout Creek flows, and that the defendant O'Shea owns the claim above plaintiff's on the creek, the water of which he conveys through a flume to a pipe, and by means of a mining instrument called a "giant," connected therewith, uses

37	231
37	586
37	231
40	556

the water to disintegrate the natural bank, thereby securing the gold imbedded therein, the resulting debris being carried in sluices by the returning water to, and deposited in or along the banks of, the creek. The defendants B. D. & H. Dyer, having leased plaintiff's mine, built a dam in the creek about three hundred feet below the O'Shea mine, constructed a flume, and diverted the water so returned, which they used in operating the mine so leased. Other lessees of the plaintiff constructed a reservoir below his dam, whereby the water flowing through the dam was stored and used in the dry seasons in operating mines along the banks of the stream, and by opening a gate in this reservoir the creek was flushed, carrying off the sediment deposited therein. The reservoir, however, having become filled with detritus, O'Shea tried to open the gate to liberate the deposit, but, being unable to do so, he and others, not parties to this suit, tore it out. B. D. & H. Dyer surrendered to plaintiff the possession of his mine, and with his consent cut the dam, but neglected to put a gate therein, and, having taken the defendant Robert Powell into partnership, they leased O'Shea's mine, in operating which there was deposited along the banks of the creek, on plaintiff's premises, debris to the depth of from three to five feet, from fifteen to twenty feet wide, and two hundred and sixty-four feet in length, and to prevent a continuation thereof this suit was instituted.

O'Shea, answering separately, denies the material allegations of the complaint, and avers that since October 1, 1893, he has been in the continuous possession, and since July 26, 1894, the owner, of his said mining claim, and that on ——— 1, 1893, he appropriated three hundred inches of the water of said creek, which he used in a lawful manner in operating his mine. For a second defense he alleges that plaintiff's dam obstructed the flow of water

in the creek, causing it to back up over his mine, thereby preventing the tailings from being carried down the stream, to his damage in the sum of \$1,000; that his claim was located, and the water from said creek so appropriated, prior to plaintiff's location and appropriation; and that his use of said water, and the return thereof by flumes to the creek above plaintiff's claim, are the acts of which he complains. For a third defense, he alleges that on October 1, 1893, the plaintiff entered into a contract with him, whereby it was agreed that he was to have the privilege of depositing debris on plaintiff's claim at the place and in the manner complained of. The other defendants deny the material allegations of the complaint, and aver that plaintiff, on May 5, 1894, leased his mine to B. D. & H. Dyer, until it should be sold or worked out, in consideration of which they agreed to dig a ditch, construct flumes, and put in sufficient pipe to mine said claim, paying plaintiff twenty-five per cent. of the gold taken therefrom; and it was stipulated that, if the mine should be sold, plaintiff would pay said defendants two-thirds of the purchase price thereof; that, said defendants having performed their part of the agreement, the plaintiff, on November 6, 1897, in consideration of the cancellation of his lease of the mine and the surrender of the possession thereof, agreed that said defendants should have the right to deposit debris from O'Shea's mine in and below plaintiff's dam. The court sustained a demurrer to O'Shea's second defense, and struck out of the other defendants' answer the averment respecting the leasing of plaintiff's mine, the consideration therefor, and the agreement to pay a part of the purchase price in case of a sale of the leased premises. Replies having put in issue the remaining allegations of new matter in the answer, a trial was had, resulting in a decree for plaintiff, and the defendants appeal.

AFFIRMED.

For appellants there was a brief over the names of *F. W. Benson* and *Coshow & Sheridan*, with an oral argument by *Mr. O. P. Coshow*.

For respondent there was a brief over the name of *Wm. R. Willis*, with an oral argument by *Mr. Dexter Rice*.

MR. JUSTICE MOORE, after stating the facts, delivered the opinion of the court.

1. It is contended that the court erred in sustaining the demurrer to O'Shea's second defense. A counterclaim is one arising out of a cause of action existing in favor of the defendant and against the plaintiff, between whom a several judgment might be had, and, as far as applicable herein, must be connected with the subject of the suit: Hill's Ann. Laws, §§ 73, 393. If it be assumed that the injury resulting to said defendant in consequence of the plaintiff's construction of his dam afforded a cause of action upon which a judgment might be rendered, the question to be considered is whether such alleged counterclaim is connected with the subject of the suit. This suit being for a tort, the injury complained of is the wrong, which consists of the deposit of debris upon plaintiff's mine, and the right, or subject of the suit, is the property which is affected by the alleged trespass: Bliss, Code Pl. (3 ed.) § 126. Thus, in *Lovensohn v. Ward*, 45 Cal. 8, it was held that the subject-matter of the litigation, in an action of replevin, was the property alleged to have been unlawfully taken by the defendant, who could not, in his answer, allege that the plaintiff had taken from him other property than that mentioned in the complaint, and ask or secure a judgment for its return, although he presented such a case as would have enabled him to recover in an independent action. The injury alleged to have been sustained by

the defendant does not affect the property described in the complaint, and hence the counterclaim was not connected with the subject of the suit, and no error was committed in sustaining the demurrer.

2. The action of the court in sustaining the demurrer can also be upheld under the rule that one independent trespass cannot be used as a set-off against another consequent upon it: *Waterman*, Set-Off (2 ed.), § 136; *Lovejoy v. Robinson*, 8 Ind. 399; *Shelly v. Vanarsdoll*, 23 Ind. 543; *Schweizer v. Weiber*, 6 Rich. (S. C.) 159; *Hart v. Davis*, 21 Tex. 411.

3. It is insisted that the court erred in striking out as sham a part of the answer of B. D. Dyer, H. Dyer, and Robert Powell. The motion upon which the order complained of was made is predicated upon the ground that the part of the answer assailed was sham, frivolous, irrelevant and redundant. The averment that plaintiff leased his mine to said defendants, in consideration of which they dug a ditch, constructed flumes, and put in sufficient pipe to operate it, was not false in fact or pleaded in bad faith, and therefore was not sham: *Foren v. Dealey*, 4 Or. 92; *The Victorian*, 24 Or. 121 (41 Am. St. Rep. 838, 32 Pac. 1040). Our statute, however, provides that, if irrelevant or redundant matter be inserted in a pleading, it may be stricken out on motion of the adverse party: *Hill's Ann. Laws*, § 85. The matter stricken out being clearly irrelevant and redundant, no error was committed in this respect.

4. It is claimed that defendant's predecessor, having deposited tailings upon that part of the public domain now embraced within plaintiff's mine, thereby appropriated the premises for that purpose, and that plaintiff took his mining claim subject to such prior right. Such a rule seems to have been adopted in California (*Jones v. Jackson*, 9 Cal. 237; *O'Keiffe v. Cunningham*, 9 Cal. 589);

but we cannot yield our consent thereto ; for no use of the premises, however long continued, can be adverse to the United States, and, as the defendant has not deposited his tailings on the plaintiff's mine for a period of ten years since the United States parted with its title thereto, no claim to continue such use can be predicated thereon : *King v. Thomas*, 6 Mont. 409 (12 Pac. 865); *Mayer v. Carothers*, 14 Mont. 274 (36 Pac. 182).

5. It is contended that the evidence shows that the defendant had a license to deposit debris on the mine below his, and that, acting upon the faith of such permission, he, with plaintiff's knowledge, expended large sums of money in purchasing and improving his property, in consequence of which the license had become irrevocable; and, this being so, the court erred in enjoining him from continuing the use of said premises. O'Shea does not allege that any consideration was paid for the license relied upon, nor does he aver any facts from which an estoppel could be implied, but, the cause having been tried on such theory without objection, the question will be considered. O'Shea, as a witness in his own behalf, testifies that before purchasing his mining claim the plaintiff told him he had no objection to his having an outlet across his land for dumpings and drainage, saying to the witness, "You can dump where you please;" that, having secured such permission, and relying thereon, he purchased his mining claim, and expended large sums in improving his property, which he would not have done except for such license. Plaintiff in his testimony makes a general denial of the license so attributed to him.

But, if it be admitted that he consented to the defendants' use of his premises as stated, we do not think the character of the work done in pursuance thereof sufficient to render the license irrevocable. The evidence fails to show what sum the defendant paid for his mine,

or for the ditch or flume constructed thereon, and, for all that appears from an inspection of the transcript, he may have been amply remunerated for such outlay by the gold realized by operating the mine. If the defendant, as he testifies, could deposit debris on the plaintiff's mine where he pleased, the result would necessarily be that he could appropriate the surface of the servient estate, if he chose to exercise the right upon which he insists. This court has adopted the rule that if a party, relying upon the faith of an express parol agreement, make permanent valuable improvements upon an estate, which may inure to the advantage of the owner thereof, the license upon the faith of which the improvements are made cannot be revoked to the prejudice of the party executing it: *Curtis v. La Grande Water Co.* 20 Or. 34 (23 Pac. 808; 25 Pac. 378, 10 L. R. A. 484); *McBroom v. Thompson*, 25 Or. 559 (42 Am. St. Rep. 806, 37 Pac. 57); *Garrett v. Bishop*, 27 Or. 349 (41 Pac. 10); *Hallock v. Suitor*, 37 Or. 9 (60 Pac. 384). It appears from the transcript that tailings deposited along the banks of the creek have been worked over several times, yielding sufficient gold to pay for the labor thus expended, so that it may be reasonably inferred that plaintiff would derive a benefit from the deposit of which he now complains; but inasmuch as the debris does not constitute a permanent improvement, and is liable to be carried out by the first freshet in the stream, we think the license, if it be conceded that it existed, was revocable.

The defendants B. D. & H. Dyer failed to establish a license to deposit debris from O'Shea's mine on plaintiff's premises; for, notwithstanding they settled upon the terms of such an agreement, for which they paid a consideration, the contract, which was to be in writing, was never executed, each party refusing to subscribe his name to a memorandum prepared by the other. The decree having recognized the defendants' prior right to the use

of the water in the right fork of said creek, it is unnecessary to consider the contention of defendants' counsel respecting such right, or to comment upon the effect of an adverse use of the waters thereof. The defendants assign other errors in the printed abstract, but, not having been insisted upon in their brief, they are deemed waived and the decree is affirmed.

AFFIRMED.

Decided 23 July, 1900.

WHEELER v. LACK.

[61 Pac. 849.]

AGREEMENT NOT CONSTITUTING A PARTNERSHIP.

1. An agreement between two persons to divide commissions in case either should furnish to the other any customers to whom sales of property should be made, without any provision for dividing losses or expenses, does not constitute a partnership.

EQUITY JURISDICTION—ACCOUNTING—INSOLVENCY.

2. Where several persons are claiming a fund, or parts of it, and a court of equity has control of such fund, it may restrain the payment thereof until the rights of all the claimants can be ascertained, and then divide it according to their respective rights, especially if some of the claimants are insolvent.

EQUITY—NECESSARY PARTIES—APPEAL.

3. Where equity is attempting to distribute a fund over which it has jurisdiction, all the persons who are known to have an interest in the fund must be brought in, and if it appears that any such person is not a party, the case should be reversed with instructions to bring him onto the record, so that the rights of all claimants may be settled in one decree.

APPEAL—TERMS FOR OMITTING NECESSARY PARTIES.

4. Where a necessary party has been intentionally or carelessly omitted from a suit, the appellate court may either dismiss the case or reverse it on a penalty (such as payment of costs), so that the absent parties may be brought in.

From Baker : ROBERT EAKIN, Judge.

This suit was commenced by John Wheeler on the eighteenth of April, 1899, against F. S. Lack, P. A. Conde, the Eastern Gold Mining Co., the First National Bank of Baker City, R. O. Deming, Charles E. Whitaker, and Butcher & Eastham. The complaint alleges, in substance, that prior to the tenth day of September, 1897,

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plaintiff entered into a partnership agreement with defendant Lack, who was at that time a mining broker at Baker City, to the effect that, if he should produce any party or parties to whom Lack might effect a sale of mining property, all commissions and brokerage earned by Lack on account thereof should be divided equally between them; that, under and by virtue of said agreement, large commissions have been earned; that no accounting has been had between plaintiff and Lack, but Lack has ignored the plaintiff's rights, and has endeavored, and is now endeavoring, to appropriate all the commissions so earned to his sole and exclusive use; that plaintiff, in pursuance of said agreement, procured and induced one Zwickey and one Van Zandt to go to Baker City to examine mining property with a view to purchasing for their principal, the defendant Whitaker, and gave them a letter of introduction to Lack, who, at the request of Zwickey and Van Zandt, procured from Deming, the owner of the Baisley-Elkhorn mine, an option thereon for \$60,000, it being understood and agreed that the brokerage and commission to be paid Lack for the use and benefit of himself and plaintiff should be the sum of \$6,000; that thereafter Whitaker caused the defendant the Eastern Gold Mining Co. to be organized, with himself, Zwickey, and Van Zandt as the principal stockholders, and assigned and transferred to such corporation all his rights under the option mentioned; that, since making the agreement with the plaintiff, Lack has formed a copartnership with the defendant Conde, and, as plaintiff is informed and alleges, transferred or sought to transfer some alleged right, title, or interest in and to the commission or brokerage due under the compact of sale to the defendant W. F. Butcher, of the firm of Butcher & Eastham, and that Conde and Butcher have each conspired and colluded with the defendant Lack to cheat, wrong,

and defraud the plaintiff out of his interest in such commission ; that the sale of the mining property by Deming to the Eastern Gold Mining Co. has been fully completed, and the purchase price paid ; that there is due to the plaintiff herein from Deming, Whitaker, and such company the sum of \$3,000, as his share of such commission, but, with full knowledge of his rights, they have attempted to pay the entire commission to the defendants Conde and Lack, by giving them a draft on an Eastern bank or party, to plaintiff unknown, which they have placed with the defendant bank for collection, and it intends to and will turn over the proceeds thereof to Conde and Lack, both of whom are impecunious and insolvent and unable to respond in damages, and against whom a judgment would be wholly worthless and uncollectible ; that plaintiff has demanded of the defendants payment of his share of such commission, but they have each and all wrongfully refused to recognize him in connection therewith, and, unless restrained, the defendant First National Bank and its codefendants will pay to Conde and Lack the full amount of such commission ; that, at the time of the transfer of the mining property, it was stipulated and agreed between Deming and Whitaker that each was to pay one-half of the commission due Lack for making such sale, wherefore the plaintiff demands a judgment against Lack for \$3,000, and an order restraining the defendants Conde and Lack, or either of them, from receiving or accepting any part of such amount from any of the other defendants, and that the other defendants be restrained from paying the same to them. The defendants Lack, Conde, the Eastern Gold Mining Co., the First National Bank, and Butcher & Eastham were served with process, and answered jointly, denying the allegations of the complaint. Upon the trial the court found that the agreement between plaintiff and Lack did

not constitute a partnership, but that a court of equity had jurisdiction to determine and ascertain the interest of the respective parties in the commission earned by Lack, and thereupon entered a decree dismissing the suit as to the First National Bank, Butcher & Eastham, Whitaker, and the Eastern Gold Mining Co., and against the defendants Conde and Lack for \$1,250, being one-half of the amount paid by Deming and Whitaker as a compromise for commissions. From this decree Conde and Lack appeal.

REVERSED ON CONDITION.

For appellants there was a brief over the names of *Butcher & Eastham* and *Chas. A. Johns*, with an oral argument by *Mr. W. F. Butcher*.

For respondent there was a brief over the names of *Jas. A. Fee* and *Smith & Heilner*, with an oral argument by *Messrs. Fee* and *John J. Balleray*.

MR. CHIEF JUSTICE BEAN, after making the foregoing statement of the facts, delivered the opinion.

The evidence shows that some time in the winter of 1896 or 1897 the plaintiff and defendant Lack entered into an arrangement whereby it was agreed that, if plaintiff should furnish Lack with a customer or customers to whom he should be able to sell mining property, they would divide the brokerage; and that a short time thereafter, at the Seven Devils, in Idaho, the plaintiff met Zwickey and Van Zandt, who had been sent out by defendant Whitaker to look for mining property for him. At his solicitation and upon his request they were induced to and did go to Baker City, the plaintiff giving them a letter of introduction to Lack, and at the same time advising him by private letter that they would soon be over

to Baker, and suggesting that he show them such property as he might have for sale. Upon their arrival in Baker, Zwickkey and Van Zandt called upon Lack, presented their letter of introduction from the plaintiff, and were shown the Baisley-Elkhorn mining property by him, although he had no option or contract for its sale from its owner. After examining the property, they reported to their principal, Whitaker, who resided in Connecticut, and advised him to come West and examine it for himself. This he did, but, being dissatisfied with the terms and conditions upon which it was offered for sale, as stated by the resident agent of the owner, declined to make the purchase, and returned home. Some time during the following summer, however, he met Deming, the owner, by request, in New York, and an agreement was entered into between them for the sale of the mine for \$60,000, which contains a stipulation that the parties thereto are to equally pay Lack whatever commissions may become necessary upon account of the sale, although there was no previous contract or agreement of the parties to pay him any commission whatever. Afterwards, and within the life of the contract, the defendant the Eastern Gold Mining Company was organized, and Whitaker transferred all his rights under the contract with Deming to such company, and on the nineteenth of September, 1898, Deming conveyed to it the mining property in question for \$60,000, and received the consideration therefor.

Lack immediately, or soon thereafter, demanded of Deming a commission or brokerage for the sale of the property, and, after considerable correspondence and negotiations, it was arranged in April, 1899, as a compromise, that Lack should be paid \$2,500 in full settlement of his claim. In pursuance of this agreement, two drafts for \$1,250 each, one on Deming and the other on Whit-

aker, were drawn by the Baisley-Elkhorn Mining Company in favor of the defendant the First National Bank in payment of such amount, and Whitaker was so advised by wire. These two drafts were delivered by Lack to one Waterman, "to take care of" or "hold until called for," who deposited them with the defendant bank for collection on his own account on the fifteenth of April. Whitaker, preferring, however, to make the settlement of his portion of the commission through Mr. Johns, his attorney, at Baker City, forwarded him by mail a draft on New York for \$1,250, with directions to pay Lack upon satisfactory arrangements being made to protect him from any further claim for commissions, and at the same time notified his local bank to return without payment the draft dated April 15, drawn on him by the Baisley-Elkhorn Mining Company. The draft from Whitaker was received by Mr. Johns on the twenty-fourth of April, and upon the same day he drew upon Deming, who resides in Kansas (the former draft having been returned unpaid), his personal draft for \$1,250, being the half of the commission to be paid by Deming, and deposited it, together with the Whitaker draft, with the defendant bank to his own credit. Before paying out the money on account of the commissions, Johns required of Lack a bond indemnifying his clients against any further liability on account thereof, which was given, with Waterman as surety. As a condition to becoming surety, Waterman required the amount coming to Conde and Lack for commissions to be delivered to him to indemnify him against liability. Johns thereupon, by consent of Lack, drew his personal check on the defendant bank, dated April 24, for \$2,400, in favor of Waterman, who on the same day deposited it with such bank to the credit of Waterman & Schmitz, and the finding of the court below is that such commission was in Waterman's hands

at the time of taking evidence in the suit. Upon this state of facts, the principal question is one of jurisdiction.

1. It is argued that a court of equity has jurisdiction because the agreement between the plaintiff and Lack constituted them partners as between themselves. A partnership has been defined to be a contract of two or more competent persons to place their money, effects, labor, skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions. A mere community of interest is not sufficient, nor will an agreement to divide the gross earnings constitute individuals partners. There must be an interest in the profits as profits, and such profits must be shared as the result of the adventure or enterprise in which both are interested, and not simply as a measure of compensation: *Cogswell v. Wilson*, 11 Or. 371 (4 Pac. 1130); *Flower v. Barnekoff*, 20 Or. 132 (25 Pac. 370, 11 L. R. A. 149). Whether two or more persons are partners as between themselves depends chiefly upon their intention as legally ascertained. Now, when we look at the testimony in this case, we find it clearly shows that the relationship between plaintiff and Lack did not have any of the elements of a partnership. The plaintiff, testifying in relation to the agreement, says: "It was just a little casual conversation we had when writing some letters for him on the typewriter in my room,—just a casual conversation. * * * It was in the winter of '96-7, I guess you would call it, in my room at the Washauer Hotel. Just a casual conversation while writing a letter for Mr. Lack. It was that if I sent a customer to him who bought any property through him, we would divide brokerage,—an agreement to that effect. * * * I don't know whether it emanated from myself or Mr. Lack. I know that he had some customers for a mining property at that time, and I know that I was figuring on

bringing somebody out here ; and it was something like this, that if we happened to send anyone to each other, and any sale was made, that we would simply divide the brokerage." The defendant Lack denies this conversation or agreement *in toto* ; but there is other evidence in the case abundantly sufficient to show that he understood plaintiff was to have some part of whatever was received as brokerage on account of the sale of the Baisley-Elkhorn mine, and, indeed, such is the admission of his counsel in their brief. Giving to the testimony of the plaintiff, however, its most favorable interpretation, the agreement did not impose upon him the duties, nor clothe him with the powers, of a partner. There was no joint ownership, according to the intention of the parties. The plaintiff was in no event to participate in the business then being conducted by Lack, or to share in his losses therein. It amounted to nothing more than an agreement that, in the event plaintiff should furnish a customer or customers to whom Lack might make a sale of mining property, they would divide the brokerage, which, as we understand it, would be a division of what might remain after the expenses incident to the transaction were deducted, and not, as the court below seems to have thought, one-half of the gross amount paid as commission. It appears in evidence that Lack was at considerable expense in earning and collecting the commission, and was compelled to pay and agreed to pay a part of it to other parties in order to collect it at all ; and it would be manifestly unfair to require him to bear all such expenses out of his half, and pay to the plaintiff, who was at no expense whatever, the other half. We conclude, therefore, that the allegations of the complaint that plaintiff and Lack are partners are not sustained by the testimony, and hence that he is not entitled to an accounting for that reason : *Salter v. Ham*, 31 N. Y. 321.

2. But there is another ground upon which the jurisdiction of a court of equity may be sustained. The complaint alleges and the evidence shows that Conde and Lack are both insolvent and unable to respond to a judgment at law, so that, if the money in payment of the commission in question ever reaches their hands, it will probably be impossible for the plaintiff to enforce the payment of any claim he may have thereon. The fund is now, or was at the trial, on deposit in the defendant bank; and, as such bank was a party to this suit, the court had sufficient jurisdiction of the specific fund to ascertain and adjust the rights of the several persons entitled to participate therein, and this is a familiar ground for equitable interference. See 1 Pomeroy, Eq. Jur. (2 ed.) § 186.

3. But there is an insurmountable objection to proceeding to a final decree at this time. Waterman, to whom the commission was in fact paid, and who deposited it in the bank, and who, perhaps, has some claim or interest therein, is not a party; and, where a proceeding in equity concerns the disposal of a specific fund, a person claiming the fund is an indispensable party: 15 Enc. Pl. & Prac. 622; *Williams v. Bankhead*, 86 U. S. (19 Wall.) 563, 22 L. Ed. 184. Now, as a general rule, a bill in equity will not be dismissed for want of parties unless they were omitted in bad faith, or unless it would be dismissed if they were before the court; but, however and whenever the objection is raised, the bill will ordinarily be allowed to stand over upon terms, in order to afford the complainant an opportunity of bringing in the necessary parties: 15 Enc. Pl. & Prac. 690. And Section 41 of Hill's Ann. Laws is intended to cover such an emergency. It provides: "The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by

saving their rights ; but when a complete determination of the controversy cannot be had without the presence of other parties, the court shall cause them to be brought in." Under a similar statute, it has been held that, when a complete determination of the controversy cannot be had without the presence of other parties, it is the imperative duty of the court to direct that they be brought in ; and this although the defect of parties appears upon the face of the complaint, and the defendants fail to demur or raise the objection in their answer : *Shaver v. Brainard*, 29 Barb. 25. Mr. Pomeroy, in discussing the question, says : " If there are other persons, not parties, whose rights must be ascertained and settled before the rights of the parties to the suit can be determined, then the statute is peremptory. The court must cause such persons to be brought in. It is not a matter of discretion, but of absolute judicial duty. The enforcement of this duty does not rest entirely upon the parties to the record. If they should neglect to raise the question and to apply for the proper order, the court, upon its own motion, will supply the omission, and will either directly bring in the new parties, or remand the cause in order that the plaintiff may bring them in : " Pomeroy, Rem. & Rem. Rights, § 419. There could be no question, therefore, about the proper practice, if we were sitting as a court of original jurisdiction ; and there seems to be abundant authority for an appellate court to reverse a cause for want of necessary parties, and remand it to the court below in order that they may be brought in : 15 Enc. Pl. & Prac. 692 ; 1 Beach, Mod. Eq. Prac. § 78 ; *King v. Commissioners' Court*, 10 Tex. Civ. App. 114 (30 S. W. 257) ; *Morgan v. Blatchley*, 33 W. Va. 155 (10 S. E. 282) ; *Jones v. Vantress*, 23 Ind. 533 ; *Webber v. Taylor*, 5 Jones' Eq. 36 ; *Shaver v. Brainard*, 29 Barb. 25. But such an order should not be made

in this case, except on payment by the plaintiff of the costs of this appeal. The plaintiff was apprised early in the trial that Waterman had or claimed some interest in the fund, and was therefore an indispensable party to the suit, but made no application to have him brought in. Upon payment by the plaintiff of defendants' costs on this appeal within sixty days, the decree will thereupon be reversed, and the cause remanded to the court below, with leave to the plaintiff to apply to that court for permission to amend his complaint by making Waterman, or any other person or persons who may have or claim some interest in the fund, a party, and for such other or further proceedings as may be proper; otherwise, the complaint will be dismissed without prejudice.

REVERSED ON CONDITION.

Argued 10 October; decided 22 October, 1900.

PARKER v. FURLONG.

[62 Pac. 490.]

TRESPASS ON MINING CLAIM—INJUNCTION.*

1. While the practice as to restraining trespassing on mining property is liberal, to prevent the destruction of the substance of the estate; yet a single act of trespass will not justify the interposition of equity: *Bishop v. Batsley*, 28 Or. 119, applied.

ENJOINING TRESPASS—INSOLVENCY OF DEFENDANTS.

2. The mere insolvency of the defendant is never of itself a reason for issuing an injunction; there must be some other equitable ground for interference.

From Douglas: H. K. HANNA, Judge.

Suit by J. B. Parker to restrain Nicholas Furlong and James Farrier from trespassing on a mining claim, in which plaintiff appeals from a decree on final hearing dismissing his complaint. **AFFIRMED.**

*NOTE.—The question of when an injunction should be granted to restrain a trespass is considered in notes to the following-named cases, viz.: *Dudley v. Hurst*, 1 Am. St. Rep. 378; *McGregor v. Silver King Mining Co.* 60 Am. St. Rep. 883, 889; *Curney v. Hadley*, 22 L. R. A. 233, 37 Am. St. Rep. 101, 108; *Wiggins v. Williams*, 30 L. R. A. 754. Read, also, *Muldrick v. Brown*, 37 Or. 185.—REPORTER.

For appellant there was a brief over the name of *Coshow & Sheridan*, with an oral argument by *Mr. O. P. Coshow*.

For respondents there was a brief over the names of *F. W. Benson* and *J. C. Fullerton*, with an oral argument by *Mr. Fullerton*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

This is a suit by J. B. Parker to enjoin Nicholas Furlong and James Farrier from trespassing upon a mining claim. The complaint, after alleging plaintiff's ownership and possession of a certain placer mining claim in Douglas County, avers that on December 17, 1897, the defendants, without claim or right, "entered and trespassed upon said claim, and commenced digging thereon, and refused to depart therefrom when demanded so to do by the plaintiff; that said defendants threaten to, and will unless restrained by an order of this court, continue to dig thereon, and will take all the water from said claim, to the great and irreparable loss and damage of plaintiff, and threaten to, and will unless restrained by an order of this court, destroy the head gates, flumes, pipes, and ditches made and placed upon said claim by plaintiff, and used by him in the development thereof, to the great and irreparable injury and damage of plaintiff;" that defendants are wholly insolvent, and plaintiff has no plain, speedy, or adequate remedy at law. A demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of suit was overruled, and the defendants answered, denying the material allegations of the complaint, and for a further and separate defense averring that the mining claim described in the complaint is the property of the defendant N. Furlong, and was duly located by him long prior to any attempted location by

the plaintiff. The reply put in issue the affirmative allegations of the answer, and upon the trial the complaint was dismissed because, as stated by the court, "there is no evidence to support the allegation of trespass complained of in plaintiff's complaint herein, and that the defendant has not committed the trespass complained of." From this decree the plaintiff appeals.

1. The suit was dismissed by the court below for want of jurisdiction, and, in the view we have taken of the matter, this presents the only question necessary to be considered. Under the ancient chancery practice, injunctions to prevent trespass upon real estate were never granted, but the parties were left to their legal remedy: *Burnley v. Cook*, 13 Tex. 586. A more liberal rule, however, now prevails, and where there is danger of the destruction of the estate, or of irreparable mischief, and the legal remedy is inadequate, a court of equity will interfere by injunction. In case of mining property greater latitude is allowed than in an ordinary trespass, because the injury generally goes to the immediate destruction of the minerals, which constitute the chief value of the estate. But before a court of equity will interfere, even to enjoin a trespass upon a mining claim, it must appear that the trespass consists in the removal or threatened removal of the ore, or in some act going to the irreparable injury or destruction of the mine: 1 High, Inj. (3 ed.) § 730; 2 Lindley, Mines, § 842; *Allen v. Dunlap*, 24 Or. 229 (33 Pac. 675); *Bishop v. Baisley*, 28 Or. 119 (41 Pac. 936). Now, there is neither allegation nor proof that the trespass committed by defendants was of this character. It does not appear that they have been or are threatening to take or remove any of the mineral from the mine, or, indeed, that it contains precious metals. The allegation of the complaint is that defendants entered upon the claim and commenced digging thereon, and, un-

less restrained, will continue to do so, and will destroy the head gates, flumes, pipes, ditches, etc., and take all the water therefrom. The only testimony on the subject is that of the plaintiff, who says that on the seventeenth of December, 1897, "Mr. Furlong came there with another party, and commenced work on the ditch. He had a big six-shooter buckled around him, and one of my men came to the house and told me he was there, and I went down and saw him working there. I took two men with me,—went to where he was working. I notified him that he was working on my ground, and I bid him to leave there. He refused to do so. He said he was going to dig that ditch, and pull up our gates, and throw them to h—, and take the water that we were using. I believe that is about all the talk we had there." This evidence shows nothing more than a single, naked trespass upon real property, and, under all the authorities, it is not sufficient to give a court of equity jurisdiction. There is no proof that the ditch referred to belongs to the plaintiff, or that the defendants had no right or title to it, or the water flowing therein.

2. The complaint alleges that the defendants are insolvent, and it is claimed this allegation is sustained by the testimony, and is sufficient of itself to give a court of equity jurisdiction. But the mere insolvency of a defendant is never sufficient reason of itself for injunctive relief: *Pensacola, etc. R. R. Co. v. Spratt*, 12 Fla. 26 (91 Am. Dec. 747). And, moreover, the allegation of insolvency is not sustained by the testimony. The only witness who testifies on the subject is the plaintiff, who says, in answer to a direct interrogatory, that he does not think the defendant is worth anything, but upon cross-examination admits that all he knows about the matter is mere hearsay. It follows that the decree of the court below must be affirmed, and it is so ordered. **AFFIRMED.**

Argued 11 September; decided 8 October, 1900.

FLEMING v. CARSON.

[62 Pac. 374.]

DISSOLUTION OF PARTNERSHIP—RECEIVER.

1. In a suit for the dissolution of a partnership it is proper to appoint a receiver, if necessary to protect the property involved, or if the members of the firm cannot agree on an adjustment.

RECEIVER—PROPRIETY OF APPOINTING.

2. On appeal in a suit for the dissolution of a partnership, the appointment of a receiver and proceedings thereunder will not be disturbed on the ground that the findings of the court on final hearing did not show cause for the appointment, if the appointment was justified when made.

PRESUMPTION THAT RECEIVERSHIP WAS PROPER.

3. The appointment of a receiver will not be disturbed on appeal in the absence of the evidence on which the lower court proceeded.

DISSOLUTION OF PARTNERSHIP—PROPRIETY OF APPOINTING RECEIVER.

4. In a suit for an accounting and winding up of a partnership, it was proper for the court to direct a receiver to sell the partnership property in order to finally adjust the firm's affairs.

DISSOLVING PARTNERSHIP—COSTS.

5. In a suit to dissolve a partnership the court expenses would ordinarily be chargeable against the assets, unless one partner was at fault so that he should be charged with costs as a punishment.

From Marion : HENRY H. HEWITT, Judge.

This is a suit by R. J. Fleming against John A. Carson for the settlement of a copartnership, for an injunction, and for the appointment of a receiver to take charge of the assets and wind up the business of the concern. On January 7, 1898, the cause being then at issue, an application was made for the appointment of a receiver, to defeat which the defendant offered to give a bond, in an amount to be fixed by the court, to satisfy any decree that might be rendered in favor of the plaintiff. The court, however, after hearing evidence and the arguments of the respective parties thereon, made the appointment, with authority to collect outstanding notes and accounts, and settle the firm business, but left the law books, office furniture and fixtures with the defendant, enjoining him

against their disposal. On June 30 following, after a hearing upon the merits of the controversy, the court filed its findings of fact and law, showing, in substance, that the parties entered into a copartnership on June 2, 1894, indefinite in duration, the plaintiff to receive one-third and the defendant two-thirds of the proceeds of the business after the payment of expenses; that they continued in business until November 28, 1897, when the partnership was dissolved by mutual consent; that a settlement was had between them on May 10, 1896, but none since; that the firm was the owner of certain enumerated articles of personal property. Then follows a statement of account between the parties, whereby it is ascertained that the plaintiff had come into the possession of \$1,313.81, and the defendant of \$3,066.20, of the funds of the concern, showing that defendant had drawn \$146.19 more than his proportion. From these findings it was concluded that the plaintiff was entitled to recover from the defendant the sum of \$146.19, that the property of the firm should be sold by the receiver, and the proceeds divided between the parties, and that plaintiff recover from the defendant his costs and disbursements. A decree was entered in pursuance of these findings, and defendant appeals. Neither the evidence upon which the order appointing the receiver was based nor that which was produced at the final hearing accompanies the record.

MODIFIED.

For appellant there was a brief over the names of *Geo. G. Bingham, D'Arcy & Richardson*, and *H. J. Bigger*, with an oral argument by *Messrs. Bingham and Bigger*.

For respondent there was a brief over the names of *Wm. H. Holmes and Tilmon Ford*, with an oral argument by *Mr. Holmes and Mr. Woodson T. Slater*.

PER CURIAM. 1. It is not sought by the appeal to disturb the findings of the court below in so far as they pertain to the accounting, and the amount found and decreed to be due the plaintiff from the defendant in pursuance thereof; but it is urged that the lower court erred—first, in appointing the receiver; second, in decreeing the sale of the partnership property and a division of the proceeds; and, third, in allowing costs against the defendant. The appointment of a receiver rests within the sound discretion of the court, but such discretion is judicial in character, and subject to review on appeal. Generally speaking, the exigencies justifying the appointment are that the plaintiff is reasonably certain to prevail, and that it is necessary to the preservation of the property involved, and the protection of the rights of all parties as their interests may appear upon the final adjudication. The rule is applicable as well where it concerns partnership matters, each partner ordinarily having an equal right to a voice in the management of the concern and in controlling the funds and assets. It has been judicially determined that, when a dissolution has taken place, and the members of the firm cannot agree upon an adjustment, a situation exists furnishing grounds for the appointment of a receiver: *Smith*, Rec. §§ 191, 205; *Law v. Ford*, 2 Paige, 310; *Whitman v. Robinson*, 21 Md. 30. The issue is involved in the case at bar, and is sufficient, if the evidence warranted it, to support the appointment. As the evidence is not here, however, we cannot consider it, and must, therefore, presume that it was also sufficient.

2. It is further suggested in this connection that the findings of the court upon the final hearing do not show that any cause existed for the appointment; but the question of the propriety of having a receiver does not appear to have been again presented at that time, and it

is sufficient if the order of appointment is justified by the consideration of the court at the time it was made.

3. It is further insisted that, as the defendant proffered a bond to meet the approval of the court for the satisfaction of any decree that might be rendered in favor of the plaintiff, the court ought not to have made the appointment. In some instances such an undertaking will obviate and relieve the necessity for a receiver (*Buchanan v. Comstock*, 57 Barb. 568; *Saverios v. Levy*, 1 N. Y. St. Rep. 758; *Popper v. Scheider*, 7 Abb. Prac. [N. S.] 56); but in the present instance the defendant is in possession of the property, while the plaintiff has an equal right thereto pending adjustment, and, the court having passed upon the propriety of the appointment, we cannot assume to disturb its action in the absence of the proofs upon which its judgment was based.

4. The receiver was authorized to direct a sale of the property, consisting of law books, bookcases, files, office furniture, and fixtures. The suit being for an accounting and a winding up of the copartnership affairs, either party could have insisted upon a sale; but, in any event, it seems to be the approved method for settling claims against the firm, cross demands of the copartners, and finally adjusting the affairs of the concern: 17 Am. & Eng. Enc. Law (1 ed.), 1296.

5. As it pertains to the allowance of costs, that is also a matter of discretion for the lower court; not arbitrarily, but judicially, exercised. As a general rule, in cases of this kind, the costs should be charged to the fund, either where the suit is necessary or beneficial to both parties, or where both are in fault; and may be imposed upon one party only, as a punishment, if he has been guilty of misconduct rendering necessary a resort to legal proceedings: 17 Am. & Eng. Enc. Law (1 ed.), 1295. We have recourse to the findings of the court

below only for a determination of the question, the evidence not having been brought up. They should support the decree; but there is nothing contained therein which tends in any manner to show that the defendant has been guilty of misconduct, or has done any act to warrant the allowance of costs against him as a punishment. From all that appears, the costs of this litigation have been incurred as a necessary expense in closing up the concerns of the copartnership, and should, therefore, be paid out of the copartnership assets: *Caldwell v. Leiber*, 7 Paige, 483, 508; *Gyger's Appeal*, 62 Pa. St. 73, 81 (1 Am. Rep. 382). The decree of the court below will therefore be modified so as to require the payment of costs out of the funds of the copartnership, and the costs attending the appeal will be adjusted by the same standard.

MODIFIED.

Decided 2 July, 1900.

BOYCE v. CUPPER.

[61 Pac. 842.]

WATERS—APPROPRIATION OF SURPLUS.

1. The right to use water from a nonnavigable public stream depends upon the date of the appropriation; thus, A, being a prior appropriator, has a right to take enough water for his necessary purposes, after which the next appropriator may use enough of the surplus for his necessary use, and so on, but the first appropriator cannot buy the land of, for example, the third appropriator and use the water for this land as against the second appropriator.

INAUGURATION OF ADVERSE USE OF WATER.

2. Where it appears that defendant's use of the water of a stream for irrigation purposes was not so extensive as to render the water supply of plaintiff, a lower riparian owner, insufficient, such use by defendant is not so adverse to plaintiff's right as to form a basis for a claim of title by adverse user: *North Powder Milling Co. v. Coughanour*, 84 Or. 9, cited.

PERCOLATING WATER—RIGHT OF RECAPTURE.

3. Percolating water, the course of which is unknown and unascertainable, belongs to the realty on which it is found, but, after having passed into a channel, ownership of it ceases and it cannot be recaptured: *Taylor v. Welch*, 6 Or. 198, cited.

From Grant: ROBERT EAKIN, Judge.

37	256
42	80
37	256
44	401

This is a suit by Clara Boyce against H. A. Cupper to enjoin the diversion of the water of a nonnavigable stream. The plaintiff alleges, in substance, that she is the owner in fee of twenty acres of fruit land in Grant County, Oregon; that about 1870 her predecessor in interest diverted the water of a small stream known as "Cupper Creek," and made a prior appropriation of all the water thereof, which he and his successors have since constantly used in irrigating said land, until about June 12, 1898, when the defendant unlawfully diverted and appropriated the water of said creek to which she is entitled, in consequence of which her fruit trees were damaged, and that if such diversion be permitted to continue she will suffer irreparable injury. The defendant denies the material allegations of the complaint, and avers, in effect, that about 1870 his predecessors in interest settled on unsurveyed public land of the United States embracing said creek, and made a prior appropriation of all the water thereof, which he and his successors have since constantly used in irrigating said land, and that the water so used by plaintiff and her predecessors was the surplus which he permitted to flow down to her premises. The reply having put in issue the allegations of new matter in the answer, a trial was had, resulting in a decree that defendant was entitled to all the water of said creek above his ditches, and the plaintiff appeals.

MODIFIED.

For appellant there was a brief and an oral argument by *Mr. Thornton Williams*.

For respondent there was a brief over the names of *John J. Balleray* and *Victor Z. Cozad*, with an oral argument by *Mr. Balleray*.

MR. JUSTICE MOORE, after stating the facts, delivered the opinion of the court.

1. The evidence shows that said creek is a small, nonnavigable stream which rises in the foothills of the western spur of the Blue Mountains, in Grant County, flows in a southerly direction, and empties into the north fork of the John Day River. The snow from these mountains, melting in the early spring, causes the creek to carry quite a volume of water, but as the season advances it gradually decreases, until about the middle of July, when the bed of the stream, except the lower part thereof, which is supplied by springs, usually becomes dry. About June, 1869, one Robert Ogle settled upon a tract of unsurveyed public lands of the United States, and, having thereafter appropriated the water of said creek to the irrigation thereof, he transferred his interest therein to William Welch, who sold the same to the defendant. The land having been surveyed, the defendant filed pre-emption and timber-culture entries thereon of one hundred and sixty acres each, but, having made final proof and secured the title to his pre-emption, he relinquished the timber-culture entry, and filed a homestead thereon, by which he secured a title thereto. Marcus Anderson settled upon one hundred and sixty acres of land on said creek below defendant's and above plaintiff's, land, and, having secured a title thereto, conveyed the premises to the defendant. The plaintiff's predecessor in interest settled upon the public lands on the north fork of the John Day River at the mouth of Cupper Creek about August, 1869, and appropriated water from the latter stream, which he and his successors have used in irrigating the land now owned by plaintiff, raising thereon fruit and vegetables. The court found that defendant's predecessor made a prior

appropriation of the water of Cupper Creek, and, while there is some conflict in the testimony respecting the priority of the appropriation, we think the finding is supported by the weight of the testimony. Whether it was Ogle's intention to secure the title to three hundred and twenty acres when the land upon which he settled was surveyed does not appear, but it is evident that defendant, when he purchased the improvements thereon from Welch, did not intend to irrigate the land upon which Anderson settled. Plaintiff's predecessor appropriated the excess of the water flowing in Cupper Creek after Ogle's prior right was supplied, and Anderson was not entitled to use any water so long as plaintiff's needs remained unsatisfied. The court further found that defendant, after securing the title to the Anderson land, had appropriated water to the irrigation thereof, and used the same more than ten years adversely, whereby a right had been acquired, as against plaintiff, to continue such use.

2. The use of the water in irrigating the Anderson land could not become adverse to plaintiff's dominant estate until it infringed her right by depriving her premises of the use of the water which was appurtenant thereto: *Wimer v. Simmons*, 27 Or. 1 (50 Am. St. Rep. 685, 39 Pac. 6); *North Powder Milling Co. v. Coughanour*, 34 Or. 9 (54 Pac. 223). The testimony shows that there are fruit trees growing on plaintiff's land, some of which have been set out about twenty-five years, and that, without the use of water from Cupper Creek to irrigate them, they must inevitably have died. This physical fact is a circumstance tending to disprove the theory that the irrigation of the Anderson land was adverse to plaintiff's use. It also appears that in most seasons the creek affords sufficient water to supply the use of every appropriation, and that plaintiff's land was never deprived of the use of

the water in the early irrigating season until 1896, when it was unusually low.

3. We think the testimony fails to show that the defendant acquired an adverse user of the water of Cupper Creek to irrigate the crops on the Anderson place, and hence he cannot use such water thereon when by doing so it would infringe plaintiff's right. The transcript shows that on the defendant's pre-emption and homestead claims there are several springs or marshes, the waters from which do not flow in any defined channel, but percolate the soil, and reach Cupper Creek below his ditches on said claims, but above the Anderson place. These springs undoubtedly supply much of the water used by plaintiff and her predecessors in irrigating the land now owned by her. It is contended by defendant's counsel that the water from these springs situate on their client's land, not being confined to any ascertained surface or subterranean channel, is a part of his estate, and, this being so, he has a right to permit it to flow into and down the creek to the Anderson place, and there capture and use it in irrigating said land. The rule is general that water percolating the soil beneath the surface, the course of which is unknown and unascertainable, belongs to the realty on which it is found: *Gould, Waters*, § 280; *Taylor v. Welch*, 6 Or. 198; *West v. Taylor*, 16 Or. 165 (13 Pac. 665); *Wheatley v. Baugh*, 25 Pa. St. 528 (64 Am. Dec. 721); *Hanson v. McCue*, 42 Cal. 303 (10 Am. Rep. 299); *Southern Pacific Ry. Co. v. Dufour*, 95 Cal. 615 (30 Pac. 783, 19 L. R. A. 92); *Roath v. Driscoll*, 20 Conn. 533 (52 Am. Dec. 352); *Trustees, etc. v. Youmans*, 50 Barb. 316; *Crescent Mining Co. v. Silver King Mining Co.* 17 Utah, 444 (54 Pac. 244). The springs and marshes situate on defendant's pre-emption and homestead claims having no perceptible outlets, the water percolating the soil therefrom continued to be his property as long as it remained a part of the soil with

which it was intermingled, but when it reached the channel of the creek defendant's property therein ceased, because it had passed his power of ordinary control. In the absence of surface water caused by rains or melting snow, the volume of water found in the bed of a stream necessarily depends upon the springs which furnish the supply. If such springs have a well-defined channel which conducts the water into a stream, an appropriation of the waters of the latter is *ipso facto* an application of the water of the springs to a beneficial use: *Low v. Rizer*, 25 Or. 551 (37 Pac. 82). When a stream is supplied by percolation, if the ownership of the water, after it reached the channel, continued in the person from whose land it imperceptibly emanated, thereby entitling him to recapture it in the stream at any point below, the right of prior appropriation would be practically denied; but, as such right is fully recognized and firmly established by the courts in the arid regions of the Pacific Coast states and territories, it follows that the right insisted upon does not exist. The defendant having no right to irrigate the land purchased of Anderson from the waters of said creek, whether it comes there by percolation below his ditches or is the excess over his use thereof, the decree will be modified in this particular, and the defendant enjoined accordingly.

MODIFIED.

Argued 16 November; decided 20 December, 1899.

QUINN v. LADD.

[59 Pac. 457.]

CURTESY UNDER THE COMMON LAW.

1. To enable a husband to claim a curtesy estate under the common law it was essential that his wife have died owning an estate of inheritance in the land in question.

WHEN ESTATES BECAME VESTED UNDER THE DONATION ACT.

2. Under the Donation Land Law (act Cong. 27 Sept. 1850), a settler on the public domain did not acquire in the land which he claimed any estate, but only a

right of possession, until he had completed the residence and cultivation required by law, and of course his wife could not have any greater estate than he had: *Farris v. Hayes*, 9 Or. 81, applied.

RIGHT OF ALIEN TO INHERIT LAND AT COMMON LAW.

8. Under the common law an alien could not acquire real property by operation of law, though he had previously declared his intention to become a citizen, and subsequently was naturalized.

From Multnomah: LOYAL B. STEARNS, Judge.

This is a suit in equity brought by Mary E. Quinn against the widow and heirs of W. S. Ladd, deceased, to impeach and set aside certain decrees of the county and circuit courts of Multnomah County on the grounds of fraud and want of jurisdiction, and for a decree declaring her to be the owner, and entitled to the possession, of a tract of land in the north half of the donation claim of Terence Quinn and wife, near the City of Portland, containing 84.21 acres, which was by such decrees adjudged to be the property of her father, Terence Quinn, and set off to him. The facts material to the view we take of the case may be stated thus: In December, 1851, Terence Quinn, an alien who had declared his intention to become a citizen of the United States, settled, under section 5 of the act of congress of September 27, 1850, commonly known as the "Donation Law," with his wife, Mary, upon three hundred and twenty acres of land, in Multnomah County. On March 7, 1854, and before the completion of the four years' residence and cultivation, Mary died, leaving the plaintiff, then an infant a few months old, as her sole child and heir at law. Thereafter Terence Quinn completed the required residence and cultivation, and on December 15, 1855, made final proof. On July 25, 1856, he was duly naturalized, and on October 27, 1860, received the final certificate for a patent; and on January 24, 1866, a patent conforming thereto was duly issued, conveying to Terence Quinn and

his heirs the south half, and to "his wife, the said Mary Quinn, and to her heirs," the north half, of the donation claim. On January 13, 1858, Terence Quinn, to secure the payment of a promissory note for \$1,500, executed a mortgage to F. N. Blanchet upon the whole claim, and this mortgage was, on the nineteenth of March, 1859, sold and assigned by Blanchet to one Meriam. On June 6, 1860, John Quinn, a brother of Terence, who had been appointed by the County Court of Multnomah County guardian of the plaintiff, then about six years old, filed a petition in the guardianship proceedings averring, in substance, that his ward and her father, Terence Quinn, were the owners, as tenants in common, of the north half of the claim, and praying for the appointment of commissioners to partition it between them. Terence appeared in such proceedings, and commissioners were appointed, who thereafter partitioned the same, setting aside 75.98 acres to the plaintiff, and 84.42 acres to her father. On September 4, 1860, the report of the commissioners was confirmed by the county court, and a decree entered apportioning the land between the plaintiff and her father in accordance therewith.

On February 13, 1861, Meriam commenced a suit to foreclose the Blanchet mortgage, and thereafter obtained a decree therein, under which he became the purchaser of the mortgaged premises, and on the second day of November, 1862, received a sheriff's deed therefor. On February 27, 1863, he commenced a suit in the Circuit Court of Multnomah County against the plaintiff and her guardian, in which he alleged, in substance, that prior to the date of the Blanchet mortgage Terence Quinn had filed his notification in the land office at Oregon City claiming the north half of the claim for himself, and the south half for his wife, but that after the execution of the mortgage he had fraudulently and wrongfully, and

with intent to injure the mortgagee, caused the notification to be changed so as to set apart the north half, or improved portion, of the claim to the heirs of his wife, and the south half to himself; that the plaintiff was a minor of about the age of eight years, and was at the time in San Francisco, and that her guardian, John Quinn, was not in the State of Oregon, but "somewhere in the mining regions of Washington Territory;" and in such suit asked for a decree adjudging him to be the owner in fee of the north half of the claim, and entitled to the possession, use, occupation, rents, issues and profits of the south half, as the assignee and representative of the rights of Terence Quinn as tenant by the curtesy. . No summons or process was ever served upon the plaintiff or her guardian, nor was any one authorized to appear for them, but an attorney, who testifies that he was retained by Terence Quinn, filed an answer denying the fraud charged in the complaint, and averring that the plaintiff and her father were the owners, as tenants in common, of the north half of the donation claim, and setting up the proceedings for partition had in the county court, and asking that the same be confirmed, expressly disclaiming any interest in any portion of the donation claim other than that set off to the plaintiff by the decree of the county court. Subsequently, on motion of such attorney, a decree was entered upon the answer taken as confessed, adjudging that the plaintiff in this suit was the owner of that portion of the north half of the donation claim set apart to her by the commissioners appointed by the county court, and that Meriam was the owner and entitled to the possession of the remainder of the donation claim. On September 16, 1869, W. S. Ladd purchased of Meriam the south half of the claim, and that portion of the north half decreed to belong to him by the Circuit Court of Multnomah

County in the suit referred to, and immediately entered into possession, and he and his heirs have continued in the actual, open, notorious and exclusive possession thereof ever since that time, claiming title.

On September 4, 1890, Terence Quinn died, and this suit was commenced in 1895. The complaint alleges that the proceedings in the county and circuit courts, already referred to, were had and done by Terence Quinn, the father of the plaintiff, for the purpose and with the intent of defrauding her out of her interest in her mother's half of the donation claim, and that W. S. Ladd was a party to, and participated in, such fraud. The answer denies the allegations of the complaint in this respect, and sets up title in the defendants through the Blanchet mortgage, the foreclosure thereof, and the proceedings of the county and circuit courts, and also pleads the statute of limitations. After the issues were made up, the case was referred to J. V. Beach, Esq., who, after hearing the testimony, filed a report in favor of defendants, which was confirmed by the circuit court, and the plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the names of *Lawrence A. McNary, Nixon & Dolph, William W. Thayer, and Henry St. Rayner*, with an oral argument by *Messrs. McNary, St. Rayner, and Chester V. Dolph*.

For respondents there was a brief over the names of *Dolph, Mallory & Simon and Williams, Wood & Linthicum*, with an oral argument by *Messrs. Joseph Simon and Stewart B. Linthicum*.

MR. JUSTICE BEAN, after stating the facts, delivered the opinion of the court.

It is claimed on behalf of the plaintiff that by reason of the settlement of her father, Terence Quinn, and her mother, Mary, upon the land in question, under section 5 of the donation law, and the subsequent issuance of a patent by the government of the United States conveying the north half of the claim, which includes the lands in controversy, to her mother and her heirs, she became the owner thereof, and that the proceedings in the county and circuit courts to divest her of the title to a portion of the same are void and of no effect, (1) because of fraud, and (2) for want of jurisdiction in the respective courts to render such decrees.

In regard to the allegations charging W. S. Ladd with fraud, it is sufficient to say that they are not supported by any evidence whatever. There is no testimony showing, or tending to show, that he was a party to, or had knowledge at any time of, such alleged fraud. It is true he was not only chargeable with constructive notice of the proceedings in the county and circuit courts, and any defect therein, but he had actual knowledge thereof, because the deed from Meriam to him of September 16, 1869, recited such proceedings, and that the land therein conveyed was the property referred to in the mortgage to Blanchet and in the subsequent proceedings for partition in the circuit court of Multnomah County. But there is no proof of fraud on his part the concealment of which would toll the statute of limitations. The first question for our consideration, therefore, is whether this suit is barred by the statute.

1. It will be observed, from the statement, that plaintiff became of age more than twenty years before the commencement of the suit, but she claims that her father,

Terence Quinn, had an estate by the curtesy in the north half of the claim, which terminated only at his death, in September, 1890, and that prior to that time the statute did not commence to run as against her. In answer to this position, it is contended by defendants that Terence Quinn never had an estate by the curtesy in the north half of the claim, because (1), as his wife died before the completion of the four years residence and cultivation required by the donation law, she did not have an estate of inheritance in the property; and (2), if she did, he was an alien, and under the common law, which was then in force, could not acquire real property by operation of law. At the death of Mary Quinn, in March, 1854, there was no statute providing for the descent of real property nor defining an estate by the curtesy. The acts of December 14, 1853 (Laws, 1854-55, p. 379), and January 16, 1854 (Laws, 1854-55, p. 405), did not take effect until the first of the following May. The question, therefore, as to whether Terence Quinn had an estate by the curtesy in his wife's half of the donation claim must be determined by the common law. And at common law it was one of the essential requisites to entitle the husband to curtesy that the wife should be seised during coverture of an estate of inheritance: 1 Washburn, Real Prop. 169-174. And an estate of inheritance is one which descends or may descend to the heir upon the death of the ancestor: 10 Am. & Eng. Enc. Law (1 ed.), 777. Unless, therefore, Mrs. Quinn was possessed of an estate on the north half of the donation claim at the time of her death which would descend to her heirs, it is manifest that her husband did not take an estate by the curtesy therein. This brings us to a consideration of the rights of the wife of a settler under the donation law prior to the completion of the four years residence and cultivation required by that act.

2. For many years after its enactment, it was held by

this court (*Lee v. Summers*, 2 Or. 260 ; *Delay v. Chapman*, 3 Or. 459 ; *Dolph v. Barney*, 5 Or. 191 ; *Love v. Love*, 8 Or. 23), and by the inferior federal courts (*Chapman v. School Dist. Deady*, 108, Fed. Cas. No. 2607 ; *Adams v. Burke*, 3 Sawy. 415, Fed. Cas. No. 49 ; *Hall v. Russell*, 3 Sawy. 506, Fed. Cas. No. 5943 ; *Alexander v. Knox*, 6 Sawy. 54, Fed. Cas. No. 170), that the donation act was a grant *in præsenti*, and vested in the settler an estate in fee from the filing of his notification, subject to be defeated by his noncompliance with the requirements of the act. But this view was not accepted by the Supreme Court of the United States, and its decision is, of course, controlling. The question came before that court in 1879, in *Hall v. Russell*, 101 U. S. 503, and, after an elaborate consideration of the nature of the grant, it was held that it did not take effect so as to pass anything more than a possessory right in the lands occupied until the completion of the four years' residence and cultivation, and full compliance with all the other conditions of the act. After citing the rule laid down in a previous decision for the construction of congressional grants, Mr Chief Justice WAITE, speaking for the court, said : "There cannot be a grant unless there is a grantee, and consequently there cannot be a present grant unless there is a present grantee. If, then, the law making the grant indicates a future grantee, and not a present one, the grant will take effect in the future, and not presently. In all the cases in which we have given these words the effect of an immediate and present transfer, it will be found that the law has designated a grantee qualified to take, according to the terms of the law, and actually in existence at the time. * * * Coming, then, to the present case, we find that the grantee designated was any qualified 'settler or occupant of the public lands * * * who shall have resided upon and cultivated the same for four consecutive years, and shall

otherwise conform to the provisions of the act.' The grant was not to a settler only, but to a settler who had completed the four years of residence, etc., and had otherwise conformed to the act. Whenever a settler qualified himself to become a grantee, he took the grant, and his right to a transfer of the legal title from the United States became vested. But, until he was qualified to take, there was no actual grant of the soil. The act of congress made the transfer only when the settler brought himself within the description of those designated as grantees. A present right to occupy and maintain possession, so as to acquire a complete title to the soil, was granted to every white person in the territory having the other requisite qualifications, but beyond this nothing passed until all was done that was necessary to entitle the occupant to a grant of the land." And consequently a settler had no estate in the land prior to the completion of the four years' residence and cultivation, which he could devise, sell, or transfer, or which would descend to his heirs. Accordingly, it was held by this court in *Farris v. Hayes*, 9 Or. 81, that a wife was not entitled to dower in her husband's half of the donation claim when he died before the completion of the four years' residence and cultivation. It must be regarded, therefore, as authoritatively determined that a settler, under the donation law, did not acquire an estate of inheritance in the land until the completion of the required residence and cultivation, and a full compliance with the other conditions of the act.

And in *Vance v. Burbank*, 101 U. S. 514, it was held that a wife acquired no greater interest in the land than her husband. In that case the husband had been defeated in a contest over a portion of the claim before the land department, and it was contended by the heirs of the wife that she was not bound by the decision. The court, however, held this position unsound, saying: "The

statutory grant was to the settler, but, if he was married, the donation, when perfected, inured to the benefit of himself and his wife, in equal parts. The wife could not be a settler. She got nothing except through her husband. If he abandoned the possession before he became entitled to the grant, her estate in the land was gone as well as his. * * * His acts affecting the claim are her acts; his abandonment, her abandonment; his neglect, her neglect. As her heirs must claim through her, whatever would bar her will necessarily bar them. The land department, until the final proofs are made, knows only the husband. If contests arise, he is the party to be notified. He represents the claim, and whatever binds him binds all interested through him in the questions to be decided. For this reason, whatever might have been the rights of the children of Mrs. Scott, if the claim had been successfully 'proved up,' their father was their representative in making the proof, and they must abide the consequences of what he did or omitted to do in their behalf. It follows that, notwithstanding the infancy of the children, the decision of the land department concludes them as well as their father." This doctrine was reaffirmed and applied in the case of *Maynard v. Hill*, 125 U. S. 190 (8 Sup. Ct. 723) where the husband and wife were divorced after the settlement, but before the completion of the four years' residence, and it was held that such divorce terminated the wife's interest in the claim, although the husband subsequently completed the necessary residence and cultivation, and made the proof required by the donation law. Mr. Justice FIELD, after referring to and quoting with approval the doctrine of *Hall v. Russell*, and *Vance v. Burbank*, said: "When, therefore, the act was passed divorcing the husband and wife, he had no vested interest in the land, and she could have no interest greater than his. Nothing had then been acquired by his resi-

dence and cultivation, which gave him anything more than a mere possessory right to remain on the land so as to enable him to comply with the conditions upon which the title was to pass to him. After the divorce she had no such relation to him as to confer upon her any interest in the title subsequently acquired by him. A divorce ends all rights not previously vested. Interests which might vest in time, upon a continuance of the marriage relation, were gone. A divorced wife has no right of dower in his property. A husband divorced has no right by the curtesy in her lands, unless the statute authorizing the divorce specially confers such right. It follows that the wife was not entitled to the east half of the donation claim. To entitle her to that half, she must have continued his wife during his residence and cultivation of the land."

The conclusion is irresistible, from the doctrine of these cases, that at the time of the death of Mrs. Quinn her husband had a bare possessory right to the claim for the purpose of complying with the requirements of the donation law, and that neither of them had an estate of inheritance therein. It is true, these decisions were all made in cases involving the construction of section 4 of the donation law, but in this regard there is no material difference between the provisions of that section and section 5, unless, indeed, as stated by the chief justice in *Hall v. Russell*, the intention of congress is even more distinctly shown in section 5 than in section 4. He says, in speaking of section 5: "There the language is 'that to all white male citizens * * * who shall in all other respects comply with the foregoing section * * * there shall be and hereby is granted,' etc. This indicates clearly that there was to be no grant except to persons who, by complying with the provisions of the act, had qualified themselves to take." We conclude, there-

fore, that, at the time of her death, Mrs. Quinn was not possessed of an estate of inheritance in the land, and therefore her husband did not take an estate by the curtesy. Nor can the subsequent issuance of a patent conveying the north half of the claim "to Mary Quinn, and to her heirs," it seems to us, be held to have vested her, by relation or otherwise, with an estate in fee at the time of her death, because, under the donation law, she had no such estate at the time. The most that can be claimed for the patent is that, under the act of congress of 1836 (Section 2448, Rev. Stat. U. S.), it conveyed the title to her "heirs, devisees, or assignees:" *Davenport v. Lamb*, 80 U. S. (13 Wall.) 418. These views lead to the conclusion that the plaintiff's suit is barred by the statute of limitations.

3. But there is yet another reason why it would seem that plaintiff's father did not take an estate by the curtesy, even if his wife had an estate of inheritance at the time of her death. At that time he was an alien, and under the common law, which was then in force here, could not acquire real property by operation of law: 2 Am. & Eng. Enc. Law (2 ed.), 70, and authorities there cited. And his previously declared intention to become a citizen, and subsequent naturalization, do not take this case out of the rule. This question was decided by the Supreme Court of Massachusetts in *Foss v. Crisp*, 20 Pick. 121. Crisp, who was an alien and a native of Spain, had made his primary declaration of intention to become a citizen of the United States before the death of his wife, and was in fact naturalized thereafter, and the question presented was whether or not he was entitled to hold the premises belonging to his wife as a tenant by the curtesy. The court, after quoting the doctrine laid down by Chief Justice SHAW, in *Wilbur v. Tobey*, 16 Pick. 179, "that an alien can take real estate, by deed or de-

wise, or other act of purchase, but cannot hold against the commonwealth; he therefore takes a defeasible estate, good against all except the commonwealth, and good against them, until they institute proceedings, and obtain a judgment by inquest of office; but an alien cannot take by act of law, as descent, because the law will be deemed to do nothing in vain, and therefore it will not cast the descent upon one who cannot by law hold the estate;" and stating that it is maintained by all the books, proceeds to say: "But it has been contended for the tenant that, by the making of his declaration of his intent to become a citizen, he had an inchoate right to citizenship in the life of his wife, and, as it was completed after her death, it should relate back, so that the disability of alienage should be removed from the time of making and filing his preliminary declaration. This argument is answered by the statute of the United States (Chapter XLVII), passed on March 26, 1804. The provision is that where an alien shall die after he has made his preliminary declaration, and 'before he is actually naturalized, the widow and the children of such alien shall be considered as citizens of the United States, and shall be entitled to all rights and privileges, as such, upon taking the oaths prescribed by law.' But it is very clear that the alien himself does not become a citizen until he is actually naturalized. Until that time the common-law disabilities of alienage continue, except as they are relaxed in favor of his widow and children by the statute of the United States, as is above stated." To the same effect are *Keenan v. Keenan*, 7 Rich. 345; *White v. White*, 2 Metc. (Ky.) 185, 189; *Crane v. Reeder*, 21 Mich. 24, 70 (4 Am. Rep. 430); *Heney v. Brooklyn Benev. Soc.* 39 N. Y. 333, 336. We are therefore of the opinion that plaintiff's cause of suit is barred by the statute of limitations,

and this conclusion renders an examination of the other questions in the case unnecessary, and the decree of the court below is affirmed. **AFFIRMED.**

Argued 12 February; decided 9 April, 1900.

SLATER v. REED.

[60 Pac. 709.]

QUIETING TITLE—ACTS DENOTING POSSESSION.*

1. The act of the person occupying a tract of farm land in taking a mortgagee into the inclosure and saying that he could take possession without making any reservation or condition vests the mortgagee with a possession sufficient to maintain a suit to quiet title.

ACTS NOT CONSTITUTING AN OUSTER OF POSSESSION.

2. Possession of real property is not ousted by an adverse claimant coming on the premises, nailing up the buildings, and instructing the tenant in possession not to enter the buildings, when such claimant did not remain on the premises or put any one in possession.

ACTS CONSTITUTING ADVERSE POSSESSION.

3. Plaintiff's grantors had occupied the premises in controversy for fourteen years. They had the property insured as their property, and had erected buildings thereon, which could equally as well have been erected on other lots, where the title was unquestioned. Defendant claimed under a deed executed by one who owned the property prior to plaintiff's grantors. Plaintiff's grantors testified that they had expected to find a superior title to the property, but that they would not have given up the property unless a superior title was shown. *Held* sufficient to show adverse possession by plaintiff's grantors.

From Polk: HENRY H. HEWITT, Judge.

This suit was originally commenced by H. P. McNary, as receiver of the Williams & England Banking Co. against J. J. Reed, to remove a cloud from the title to certain town lots. The present plaintiff, Woodson T. Slater, was substituted for McNary during the progress of the suit. Defendant appeals from the decree.

AFFIRMED.

*NOTE.—This suit was instituted in 1897, under Section 504, Hill's Ann. Laws, providing that "Any person in possession by himself or his tenant of real property may maintain a suit in equity against another who claims an estate or interest therein adverse to him, for the purpose of determining such claim, estate or interest." The amendment of 1899 had not then been passed, and the decision is made with reference to the old law.—REPORTER.

For appellant there was a brief and an oral argument by *Mr. Geo. G. Bingham*.

For respondent there was a brief over the names of *W. T. Slater* and *W. M. Kaiser*, with an oral argument by *Mr. Slater, in pro. per.*

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

This is a suit to remove a cloud from the title to lots 1, 2 and 4, in block 7, Town of Eola, Polk County, Oregon. The plaintiff derails title from one William Duran and Jane C. Duran, his wife, who conveyed them by warranty deed to Thomas J. Riggs, September 22, 1855. Riggs having died, his heirs, conveyed them to Williams, England & Co., as mortgagees, for the use and benefit of O. J. Beardsley, with the condition that the deed therefor should be held as a mortgage to secure the payment of the purchase price thereof, and for other funds advanced and to be advanced by said Williams, England & Co. for her use and benefit. By due assignments and transfers subsequently made, the Williams & England Banking Co. became the owner of all the interest of Williams, England & Co. in and to said mortgage and premises. The property of the banking company having gone into the hands of a receiver, a suit was instituted, and on the — day of June, 1896, a decree rendered foreclosing said mortgage, and directing the premises in controversy to be sold, with other lands, to satisfy said indebtedness of O. J. Beardsley to the receiver. There was no sale under the decree, but O. J. Beardsley and her husband, O. P. Beardsley, executed to said receiver a confirmatory deed, for the consideration of \$12,000, to the premises in dispute, and other lands therein described. It is alleged that plaintiff and his grantors have been in adverse possession of the lots since the twenty-second day of Septem-

ber, 1855, and that the defendant claims under a quitclaim deed from William and Jane C. Duran, his wife, to one Alvin C. R. Shaw, executed September 3, 1855. Shaw and wife deeded to Joseph W. Downer, Edward Steelman, and Robert Combs, by warranty, November 7, 1858; Steelman and Combs to Downer, April 23, 1860; and Downer to the defendants, May 22, 1896. Duran's deed to Shaw does not appear to have been recorded.

Three questions are presented: (1) Was plaintiff in possession at the time of the institution of this suit? (2) Have he and his grantors been in the adverse possession for more than ten years, it being conceded that defendant has the better paper title? (3) Did the said grantors intend that the premises in dispute should be included in the confirmatory deed?

1. It is an admitted fact that Mrs. O. J. Beardsley was in possession of the lots in dispute at the time of the execution of the confirmatory deed. Mr. H. P. McNary relates that while the suit for the appointment of a receiver was pending, and before a decree was rendered therein, he drove out to the place for the purpose of taking possession; that Mrs. Beardsley went with him to the different pieces of property, and put him into full possession thereof. In order to appreciate the manner in which possession was taken, a description of the premises should be given. There are situated upon the lots in question two hop houses, used for curing and drying hops,—one upon lot No. 1, and the other upon lot No. 4. A short distance to the east or southeast of these stands a third, but not upon the disputed lots. All of these houses were, and had been ever since their construction, used in connection with the hop yard located approximate thereto. The lots, hop yard and other lands were all contained in one inclosure. After relating that Mrs. Beardsley took him upon the different pieces of property,

he further states that she took him into the field where those houses were located,—rather to the east of them,—and turned over the whole of the property to him, making no reservation of any kind. It is significant that the bank was taking possession through Mr. McNary as mortgagee, and Mr. and Mrs. Beardsley were delivering the premises covered by the mortgage. The event occurred before the foreclosure suit had been instituted, and it is very natural to suppose that, without some express reservation, she intended to deliver the whole of the premises, including the hop houses. The claim that the house situated off of the premises in dispute went with the delivery is not controverted, and, if that passed, the others undoubtedly did by the same act.

2. The bank therefore obtained and continued in possession unless it was ousted by the act of defendant Reed. All the evidence touching such action is that given by Mr. Slater, who is now the receiver of the bank. When relating a conversation that occurred between him, Reed and the Beardsleys, touching the houses in dispute, he says, among other things, that “Mr. Reed had previously been down to the hop houses, and had nailed them up, and had forbidden our tenants to enter them.” Reed had put no one in possession of the property, nor did he remain there personally. It can hardly be said that such exercise of possession constituted an ouster of the plaintiff, so as to displace his possession of the premises in dispute. But, were it otherwise, the pleadings admit the plaintiff’s possession. The complaint contains this allegation: “That this plaintiff has leased said premises, including the said hop yard and hop houses, to W. H. Holmes and Aleck Holmes, who are now in the possession of said premises.” This is not denied. Again it is alleged “that the present right to the possession of said premises, and the present possession thereof, are in the

said tenants of plaintiff," etc. This is partially denied, in the following language: "Denies that the present right to the possession of said lots 1, 2 and 4 in said block 7 is, or has at any time been, in the tenants of plaintiff, or any part thereof." Here is enough to show that there was no intention of disputing the actual possession, and that it was only the right thereto which was drawn in question.

3. The next controversy is regarding the adverse holding. It will be unnecessary to refer to a date anterior to the deed from the Riggs heirs to Williams, England & Co. This deed was executed January 4, 1882. At that time Mrs. Beardsley went into possession of the premises in controversy, and about this there is no dispute. She inclosed them shortly after by building a fence around them, including the other premises. In 1883 she constructed the hop house on lot No. 1, and in 1885 the one upon lot No. 4, and used and maintained these houses thereafter up to the time of delivery of possession to the bank, in connection with her hop yard, in drying and curing hops produced upon the premises each and every year. That the possession was continuous is not questioned. But it is asserted with much confidence that Mrs. Beardsley's possession was not under claim of right or title, but that she held merely in subordination to the true title. Mr. Beardsley testifies that they took chances of building on the lots, and that, if it had turned out that they belonged to some one else, then that they would have had to buy them; that he did not know Duran had deeded the lots until when he was assisting Mr. Slater in preparing the complaint for the foreclosure; that he knew prior to this that Shaw had deeded the lots, but did not know that he had any deed himself; that he understood the deed covered these lots by the general description, but not by specific designation. He was then interrogated

as follows: "Q. Then you took possession of it, and intended to hold it until some one could prove to you a better title. Is not that a fact? A. Well, I don't know. Why, I guess, perhaps, that would be what it meant. Q. You did not intend to surrender these lots just because they said they owned them? A. No; they would have to show title. Q. Then, as far as any other person was concerned, you claimed to own them until another person would show a better title? A. I did not claim to own them." Mrs. Beardsley testified in answer to the following questions: "Q. Did you claim possession of these lots as your own at the time you bought them? A. We could not find as they were ours. We could not find who the owner was, and we wanted to build the houses on this place, and we run the risk of finding the owner of them. Q. Were you claiming these lots by virtue of having been in possession of them for a long time at the time that you made this deed? A. No, sir. Q. I will ask you this: If at any time you have claimed these lots by virtue of your right of possession? A. No, sir." On cross-examination: "Q. Mrs. Beardsley, at the time you bought these lots and property from Mr. Riggs, you intended to claim all that would be covered by his deed, did you not? A. All we thought we owned by reason of the deed, we intended to claim. Q. Did you ever know that any other person ever claimed this land? A. No; we did not know. We could not find out. We could not trace it. Q. But you had possession of them all this time? A. Well, yes, in a way. We were using them. We fenced them in. Q. Was it your intention to surrender them? A. We would have it to do. We expected to buy them when we found the person who owned them. Q. You did not intend to rely entirely upon Riggs' deed as a title? A. No, sir; we could not trace the title. Q. Well, now, as a matter of fact, didn't you

intend to hold these lots against the whole world until some one could prove a better title? A. Yes, sir; in a way. If some one came with a better title, we expected to buy it; but, of course, if our title was best, we would not have to buy them."

Over against this testimony, it appears that Mrs. Beardsley, through her husband, who acted as her agent in the transaction of much of, if not all, her business in connection with the property, had these houses insured from year to year, making the loss, if any, payable to Williams & England Banking Co. as its interest might appear. In the application for such insurance she represented that the property was covered by this mortgage; that she was the sole and undisputed owner of the land and property to be insured, and that the title was in her name; that she enjoyed the property, and had a bond for a deed; and that the property was occupied by the owner. These houses were built at an expense of about \$500 each, a portion of the money being advanced by the banking company for the purpose; and they were constructed upon these lots, when it would have been just as convenient to have constructed them on the adjoining land. In these acts there was not only an exercise of absolute ownership, but an assertion of absolute title under the deed held by the banking company for her use and benefit. The defendant is the son-in-law of the Beardsleys, and it is a significant fact that he did not procure this deed until he had been informed by Beardsley that there was a prior outstanding deed, which information the latter had obtained from Mr. Slater while he was preparing the complaint for foreclosure proceedings; and it is quite probable that, if it had not been for this disclosure, Reed would never have procured the deed under which he claims title. So that there is a strong motive present for the Beardsleys now to disclaim any ownership of these

lots while in the possession and exercising dominion over them. Their testimony is equivocal, and not consistent with their previous acts and pretensions, and impresses us as being much less convincing. The acts of these parties are more potent than words. When the attending circumstances and the manner in which they used and employed this property for more than fourteen years are considered, it is difficult to believe that they were not also claiming the title absolutely as against the world, and the weight of evidence adduced discredits such disclaimer.

There is some contention that the plaintiff recognized the defendant's title by offering to rent the houses from him. But plaintiff had no such purpose. There was an attempt on his part to obtain defendant's consent to the use of the houses by the tenants pending a settlement of the dispute, under a proviso that whatever arrangement was then made or entered into in that particular was not to impair the rights of either party to the controversy in the meanwhile. The arrangement was not agreed to, and the negotiations did not amount to an acknowledgment of Reed's title.

We come now to the last question, which is not difficult of solution. While Mr. Slater was preparing the complaint for the foreclosure, he became cognizant of an outstanding deed to Shaw, and that he had conveyed it to Downer and others; and, having consulted with Beardsley touching the matter, the latter became cognizant of the fact, also. The complaint comprised in its general description of the premises the lots in dispute, but did not designate them specifically. The decree, however, went further, and specified in the description "all of block seven." The confirmatory deed was prepared in July, 1896, by Mr. Slater, the bank's attorney, but was not executed by the Beardsleys until November 13, 1896. Mr. and Mrs. Beardsley both testify that they

did not read, or have an opportunity to read, the deed, but relied upon Mr. Slater's representation that it contained the same description that was contained in the complaint; therefore, that they did not agree or undertake to convey the lots in question. Mr. Slater testifies that Mr. Beardsley read the deed very carefully, and understood the description contained therein. But, whatever may be the fact in this respect, it is clear that the description contained in the complaint was ample and sufficient to carry the title to these lots, and included them within the designated boundaries. So that, in whatever sense they may have understood the description placed in the deed, in either event the title to the lots would have been carried under the deed. These considerations affirm the decree of the court below, and it is so ordered.

AFFIRMED.

37 · 282
42 608

Argued 18 February; decided 23 April, 1900.

SHAVER v. ADAMS.

[60 Pac. 902.]

BOUNDARIES—ANCIENT PLATS AND SURVEYS.

In ascertaining the location of a boundary monument the fact that property was laid out with reference to a certain stone, and that public improvements were made shortly after the original survey using such stone as a known point, affords a strong inference that it is the monument originally placed to mark the boundary, rather than another stone which was first claimed to be the true monument by a surveyor who ran the lines many years after the monument had been set.

From Clackamas: THOS. A. McBRIDE, Judge.

This is a suit by George W. Shaver against W. D. Adams to ascertain and establish the dividing line between contiguous lands. The facts are that on June 29, 1880, plaintiff, being the owner in fee of the Hugh Gordon donation land claim, in Clackamas County, Oregon, conveyed to one Laramie Mayer one square acre thereof,

situated in the southeast corner, excepting therefrom two tracts which had theretofore been conveyed. The defendant owns the tract so conveyed to Mayer, and a controversy has arisen respecting its north boundary, growing out of the uncertainty as to the location of the southeast corner of said donation claim; the defendant insisting that the corner is evidenced by a stone marked with a cross, while plaintiff, who owns the land adjoining defendant's on the north, maintains that the said corner is indicated by a stone having a hole drilled therein, situated about twelve feet south and about four feet east of the stone claimed by the defendant as the corner. The cause was tried upon the theories of the respective parties, and from the evidence, taken before a referee, the court found that the stone having a cross thereon was the initial point, and that the north boundary of defendant's tract begins at a point in the east boundary of the claim 208 feet and 8.52 inches north of said stone, and runs thence west, parallel with the south boundary of said claim, 208 feet and 8.52 inches, to a point; and, having rendered a decree establishing such line as the boundary, plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the name of *Thayer & St. Rayner*, with an oral argument by *Mr. Henry St. Rayner*.

For respondent there was a brief over the name of *C. D. & D. C. Latourette*, with an oral argument by *Mr. C. D. Latourette*.

MR. JUSTICE MOORE, after stating the facts, delivered the opinion of the court.

The original stake set by the government surveyor to evidence the southeast corner of the Hugh Gordon donation land claim having been lost or destroyed, the relocation of the point at which said stake was so placed is the pivotal question presented by this suit. The evidence shows that such point is also the southwest corner of the Mathias Sweigle, the northwest corner of the William Engle, and the northeast corner of the James Larkins, donation land claims. County roads running in the direction of the cardinal points of the compass cross at this point, and, several buildings having been erected at and near the cross roads, the place is known as the "Village of Molalla." Laramie Mayer, as defendant's witness, testified that, prior to and at the time he purchased the one-acre tract from plaintiff, the latter, in describing its boundaries, told him that the southeast corner thereof was evidenced by a stone set in the center of the cross roads, and subsequently took him to, and pointed out, said north stone as the corner; and, a barn having been included in the purchase of said tract, plaintiff and the witness measured the required distance from this stone north, and found that about one-half of the barn extended beyond the boundary upon plaintiff's land, whereupon the witness moved the barn and built a fence upon the line. Mayer also says that he drilled the hole in the south rock for the purpose of testing some drills he intended taking to the mountains. The testimony of this witness respecting the measurement made by him and plaintiff from the stone so pointed out by the latter, to determine the north boundary of the tract in question, and the hole drilled by Mayer in the south rock, is corroborated by that of O. P. Miller, who says the south

stone was taken from a cellar dug by him, and placed in the road, with other filling, for the purpose of leveling up a low place. I. L. Hoffman, in 1892, surveyed the boundary lines of the said donation land claims from points established by the government surveyor in the respective lines, and, while the distance from the established points to the point of intersection did not in any instance coincide with the field notes, he located the initial point at the south stone, and marked it as such. Henry Meldrum surveyed the lines so run by Hoffman, and, appearing as plaintiff's witness, states that in his opinion the south stone is correctly located as indicating the corner. All the buildings erected at Molalla prior to Hoffman's survey seem to have been put up with reference to the line as claimed by defendant, and the stone marked with a cross is very nearly in the center of the cross roads.

John Meldrum resurveyed the boundaries of the Sweigle donation land claim, and, appearing as defendant's witness, stated that in his opinion the north stone was set as a monument to evidence the initial point; and, as a reason for such opinion, he said that the Sweigle claim was the first surveyed, and that, in retracing the boundaries thereof without reference to the other claims, he found the north stone properly located the southwest corner, and that, considering the establishing of the cross roads, the building of the fences, and the erection of the houses conformable to the lines as claimed by defendant, he was convinced that the north stone is placed at the point at which the southeast corner of the Gordon claim was originally located. Samuel Engle, son of William Engle, who had lived on his father's donation land claim about fifty years, having been called as a witness by defendant, testified that he had seen the stake originally set as a monument evidencing the northwest corner of

said claim ; that the north stone, which had been in its present position about twenty-five years, was placed at about the point where the stake was set by the government surveyor ; and that he had never heard of any other corner than such stone until after Hoffman's survey.

If it be assumed that the southeast corner of the Hugh Gordon donation land claim could not be found, the method adopted by surveyors Hoffman and Henry Meldrum to locate the corner by retracing the surrounding surveys was undoubtedly correct ; for the rule is that where there are no marks to the contrary, restraining it, a survey goes to its adjoinders : 4 Am. & Eng. Enc. Law (1 ed.), 783. In *Lewis v. Prien*, 98 Wis. 87 (73 N. W. 654), it is held that the unvarying rule to be followed in establishing a lost corner is to start at the nearest known point on one side of the lost corner, on the line on which it was originally established ; then to measure to the nearest known corner on the other side, on the same line ; then, if the length of the line is in excess of that called for by the original survey, to divide it between the tracts connecting such two known points, in proportion to the length of the boundaries of such tracts on such line, as given in the survey. Whatever the rule for establishing a lost corner may be, it can have no application to the case at bar ; for, in our judgment, the southeast corner of the Hugh Gordon donation land claim is not lost. From the fact that all the buildings erected at Molalla prior to Hoffman's survey appear to have been put up with reference to the lines as claimed by defendant, it is fair to infer that when such buildings were constructed it was generally known where the initial point was located : *City of Racine v. Emerson*, 85 Wis. 80 (39 Am. St. Rep. 819, 55 N. W. 177). The construction of these buildings, some of which have been standing about twenty-five years, is not conclusive as to the location of the corner in ques-

tion, for a mistake may have been made in putting up the first house ; but the location of these houses is a circumstance from which it may be inferred that the boundaries of the donation land claims intersect at the north stone. The testimony of Samuel Engle, who claims that the north stone was placed at or about the point occupied by the original stake, in connection with such inference, leaves no doubt in our minds that such stone should be taken as the initial point of the survey, and that the north boundary of the one-acre tract as found by the circuit court is correct. The testimony of one witness tends to show that the road running east and west at Molalla was originally only forty feet in width, but, having been widened to sixty feet, the extension was accomplished by moving the fence on the north side of the road ; and it is argued that this is a circumstance from which it may reasonably be inferred that the south stone marks the spot occupied by the original stake. Such inference is a logical deduction from the fact, but we think the testimony of Engle overcomes such inference, and shows that the north stone, which is placed nearly in the center of the cross roads, is the southeast corner of the Gordon claim, and hence the decree is affirmed.

AFFIRMED.

Argued 21 February; decided 5 May, 1900.

WATSON v. NOONDAY MINING COMPANY.

[55 Pac. 867, 58 Pac. 36, 60 Pac. 904.]

ADVERSE PARTY—SERVING NOTICE OF APPEAL.

1. In a case where a property owner appeals from a decree foreclosing several liens of equal rank the lienors are not adverse parties, as between themselves, so that one of them can have the appeal dismissed because the appellant failed to serve the notice on another of such lienors ; for, if the decree is affirmed, the lienors are unaffected, while, if the liens of the claimants who were notified shall be defeated, the unnotified lienors are better off than before the appeal—and they will not be heard to object that another claimant was not served.

APPEAL BOND—WITHDRAWAL OR RELEASE.

2. When a bond has been filed and become a part of the appeal record, the court will not undertake to release the sureties thereon or affect the rights and liabilities of the respective parties thereto on an interlocutory motion.

MECHANIC'S LIEN—MINE NOT A STRUCTURE.

3. A mine or mining claim is not a "structure" within the meaning of Section 3609, Hill's Ann. Laws, which confers the right to a lien for material or labor used in any structure, so that a mill and a tramway thereto from a mine are structures by themselves, and a lien may be enforced against them without reference to the mine: *Williams v. Toledo Coal Co.* 25 Or. 426, cited.

MECHANIC'S LIENS—JUDGMENT AGAINST OWNER.

4. The decree in this case, though it may seem to be personal against the property owner for the amount of the contractor's debts, is not so when closely examined.

DECREE EXCEEDING SUM DUE ON THE CONTRACT.

5. In a mechanic's lien case the decree may under some circumstances be given for an amount exceeding the balance due the contractor: *Hill's Ann. Laws*, § 3678.

From Douglas : J. C. FULLERTON, Judge.

Decided 28 January, 1890.

ON MOTION TO DISMISS APPEAL.

Messrs. Andrew M. Crawford and John W. Whalley, for the motion.

Messrs. F. W. Benson and O. P. Coshaw, contra.

PER CURIAM. This suit was brought in the Circuit Court of Douglas County by J. Frank Watson to foreclose certain material men's liens on a mining claim in that county, belonging to the defendant, the Noonday Mining Co. The John A. Roebling's Sons Co., a foreign corporation, was made a defendant, under the allegation that it had or claimed some interest in or lien upon the mine, but that such interest or claim was subsequent to and subject to plaintiff's lien. It answered, denying that its claim or lien was subsequent to that of plaintiff, and setting up a lien for materials furnished by it to the contractor and agent of the Noonday Mining Co., which it alleges is superior to the lien of plaintiff. The Noonday Mining Co. answered, putting in issue the validity of both liens ; and a trial resulted in a decree establishing

the liens of both these parties, and directing the sale of the mining property, and the distribution of the proceeds among them. From this decree the Noonday Mining Co. appealed, by serving a notice thereof in Douglas County upon the resident attorney of the plaintiff, and in Multnomah County upon the attorneys of Roebeling's Sons Co., who are residents of such county.

1. The plaintiff now moves to dismiss the appeal, on the ground that the Roebeling's Sons Co. is an adverse party, and that service of the notice of appeal upon its attorney in Multnomah County is not sufficient to confer jurisdiction. Conceding the soundness of the latter position for the purposes of this motion, and assuming that no appeal has been taken from the decree of the court below establishing the lien of Roebeling's Sons Co., the motion of the plaintiff is, nevertheless, not well taken, because the Roebeling's Sons Co. is not an adverse party on such appeal, within the meaning of the rule sought to be invoked. Its interests are not in conflict with a reversal or modification of the decree so far as the plaintiff is concerned. Its rights would not be injuriously affected if defendant should prevail on this appeal, and the decree establishing plaintiff's lien should be reversed, but, on the contrary, it would be benefited thereby. In such case the security for the payment of its lien would be increased, and it would not be compelled to share with the plaintiff in the proceeds of the property upon which it is claiming a lien. Its lien was established by decree of the court below, and the property decreed to be sold thereunder; and, unless the Noonday Mining Co. has perfected an appeal from such decree, it is conclusive upon the rights of the parties, and can in no way be affected by the appeal which has been taken from the decree establishing the plaintiff's lien. If, upon the hearing in this

court, the decree in favor of plaintiff shall be affirmed, the interests of Roebling's Sons Co. will not be affected; and if it is reversed, and the complaint dismissed, then in such case said company would be benefited by the appeal; so that, whatever may be the rule in reference to the service of a notice of appeal under the circumstances disclosed by this record, the plaintiff cannot take advantage of any defect therein so far as the attempted appeal from the decree in favor of Roebling's Sons Co. is concerned; and plaintiff's motion to dismiss must be overruled.

MOTION OVERRULED.

Decided 31 July, 1899.

ON MOTION FOR LEAVE TO WITHDRAW AN APPEAL BOND.

Mr. O. P. Coshow, for the motion.

Messrs. John W. Whalley, Andrew M. Crawford, and Wm. R. Willis, contra.

PER CURIAM. 2. This is a motion for leave to withdraw from the files of this court an undertaking on appeal, and for an order releasing the sureties thereon. When the appeal was taken, an undertaking was filed for all damages, costs and disbursements which might be awarded on the appeal, and, as the appellant supposed and was advised, for a stay of proceedings also. Thereafter the respondent caused an execution to be issued, and upon a hearing relating thereto before the circuit judge it was decided that the undertaking was not sufficient to stay proceedings, and thereupon the appellant caused to be filed an amended undertaking on appeal, and for a stay of proceedings also, and now desires to withdraw the one first filed. But we do not think the motion therefor should be allowed. These undertakings are voluntary obligations, and are a part of the record

in the case, and we ought not to determine, or seem to determine, the rights of the sureties on the respective undertakings as among themselves, or their liability to the respondent, upon a motion of this character. The motion is therefore denied. MOTION OVERRULED.

Decided 5 May, 1900.

ON THE MERITS.

This is a suit by J. Frank Watson to foreclose the liens of certain material men. The transcript shows that the defendant, the Noonday Mining Co., a corporation, being the owner of a mine in Douglas County, Oregon, entered into a contract with the Hammond Manufacturing Co., a corporation, in fulfilling which the latter erected for it a stamp mill, and built a tramway from the mill to the mine, procuring material therefor from the parties and of the value following, to wit: Smith & Watson Iron Works, \$2,223.81; Goldsmith & Loewenberg, \$351.93; San Francisco Novelty & Plating Works, \$286.89; William Isensee, \$343.57; Gutta Percha & Rubber Manufacturing Co., \$903.03; Lakin & Lee, \$148.68; Good-year Rubber Co., \$178.69; and Henshaw, Sewell & Cowston, \$574.01. The parties furnishing such material not having been paid therefor, filed liens against the mill and tramway and the Noonday Mining Co.'s interest in the premises on which such improvements were made, and thereafter assigned their claims to plaintiff, who commenced this suit to foreclose the liens, alleging that the defendants, the John A. Roebling Sons Co., a corporation, Al. Parker, Daniel M. Tracy, and Charles F. Morse claimed some interest in said premises, but that such interest was subordinate to his liens. The Noonday Mining Co. demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of suit, and

that it failed to give a description of the property sought to be charged with the liens sufficient for identification ; but, the demurrer having been overruled, it filed an answer, denying, upon information and belief, the material allegations of the complaint. The John A. Roebling's Sons Co. filed an answer denying that its claim was subordinate to plaintiff's liens, and, alleging that it furnished to the Hammond Manufacturing Co. material of the value of \$1,284.65, to be and which was used in making said improvements, and not having been paid any part thereof, filed a lien therefor against the mill, tramway, and the land upon which they are situated and the land connected therewith as a mine, to the extent of the Noonday Mining Co.'s interest therein, and prayed that its lien might be foreclosed. The other defendants having made default, a trial was had, resulting in a decree foreclosing said liens, and directing that the mill and tramway and the land upon which they are situated be sold to satisfy the amounts found to be due, and the Noonday Mining Co. appeals.

AFFIRMED.

For appellant there was a brief over the names of *F. W. Benson* and *Coshow & Sheridan*, with an oral argument by *Messrs. Benson* and *O. P. Coshow*.

For respondent Watson there was a brief and an oral argument by *Messrs. John W. Whalley, Wm. R. Willis, Andrew M. Crawford, and Edw. B. Watson*.

For Roebling's Sons Co. there was an oral argument by *Mr. Harry M. Cake*.

3. It is contended by appellant's counsel that a mine is included within the meaning of the word "structure," as used in the mechanic's lien law (Hill's Ann. Laws, § 3669), in the light of which a mill, tramway and mine

are connected and inseparable, the entirety of which precludes a lien for material used in building the mill or tramway from attaching to either separate from the mine; that, plaintiff's assignors not having included the mine connected with the mill by the tramway in their notices of liens, the court erred in decreeing a foreclosure thereof; and that the failure of the liens and of the complaint in this respect was not waived by answering over after the demurrer was overruled. In support of the position for which they contend, counsel cite the cases of *Helm v. Chapman*, 66 Cal. 291 (5 Pac. 352), and *Williams v. Mountaineer Gold Min. Co.* 102 Cal. 134 (34 Pac. 702, 36 Pac. 388), in which it was held, in the first case, that a mine or pit sunk in a mining claim was a structure, and in the second, that a claim of lien for materials furnished for the construction of a mill, tramway, boarding house and reduction works upon a mining claim should be against such claim, and not against the specific structures on the mine. The general statute of California respecting liens of mechanics and others upon real property, which was construed by the supreme court of that state in the cases to which our attention has been called, provides that "any person who performs labor in any mining claim or claims has a lien upon the same, and the works owned and used by the owners for reducing the ores from such mining claim or claims, for the work or labor done or materials furnished by each respectively:" Code Civ. Proc. Cal. § 1183. It will thus be seen that the Legislatively Assembly of California, in enacting a lien law, has treated the mine and the reduction works, when owned and operated by the same party, as real property which is benefited by the labor performed upon or the material used in the improvement of either the mill or the mine; and whether the supreme court of that state, in construing such statute, properly

held that the mill and the mine and the tramway connecting them constituted an entirety, it is not necessary for us to consider.

The legislative assembly of this state evidently did not consider that the word "structure," as used in the general lien law (Section 3669, Hill's Ann. Laws), included a mine or mining claim, for at the same session at which said section was amended, a separate act was passed securing liens on mining claims: Laws, 1891, p. 76. Section 1 of said act provides: "That every person who shall do work or furnish materials for the working or development of any mine, lode, or mining claim or deposit yielding metals or minerals of any kind, or for the working or development of any such mine, lode, or deposit in search of such metals or minerals; and to all persons who shall do work or furnish materials upon any shaft, tunnel, incline, adit, drift, or other excavation, designed or used for the purpose of draining or working any such mine, lode, or deposit, shall have a lien upon the same, to secure to him the payment of the work or labor done or materials furnished by each respectively which shall attach in every case to such mine, lode, and deposit, and though such shaft, tunnel, incline; adit, drift, or other excavation be not within the limits of such mine, lode, or deposit." In *Williams v. Toledo Coal Co.* 25 Or. 426 (42 Am. St. Rep. 799, 36 Pac. 159), it was held, in construing this section, that no lien could attach for labor performed in constructing a wagon road where it did not appear, either in the notice of lien or in the complaint in a suit to foreclose the same, that such wagon road was an incline or excavation used for the purpose of working the mine. The reduction of ore near the mines from which it is taken must, by saving the cost of transportation, necessarily benefit the mine owner to the extent of the expense thus saved, but such reduction, however beneficial it may prove when accom-

plished near the mine, cannot be regarded as the working or development thereof, within the meaning of the act in question, so as to give a lien on the mine for material furnished in constructing or for labor performed in operating the mill. The building of a tramway from a mine to a stamp mill probably cheapens the cost of transporting ores, but such tramway is constructed as a means to facilitate the operation of the mill, and not for the purpose of working or developing the mine which supplies ore to the mill; and as it is the labor performed or material furnished for the working or development of a mine that creates a lien, which attaches to the mine or mining claim, we are unable to perceive, from the character of the improvement, any material difference between the tramway and a wagon road used for the same purpose. The statute of this state respecting liens on mines and mining claims, when compared with the statute of California on that subject, will show that they are quite dissimilar, and, in our judgment, the mine, mill, and tramway, under our statute, do not constitute such an entirety as to render a lien for material used in erecting the mill and in constructing the tramway void because such lien was not filed against the mine also.

4. It is maintained that a personal judgment has been erroneously rendered against the Noonday Mining Co. upon contracts to which it was not a party for the value of material furnished to the Hammond Manufacturing Co. The statute makes every contractor having charge of the construction of any building or improvement for another the agent of the owner for the purposes of the mechanic's lien law: Hill's Ann. Laws, § 3669. The Hammond Manufacturing Co. having entered into a contract with the Noonday Mining Co. for the building of the mill and tramway, made the owner thereof a party to each contract entered into between the Hammond Manu-

facturing Co. and such lien claimants for material used in making such improvement under the maxim, "*Qui facit per alium facit per se.*" The court decreed, in effect, that plaintiff and the John A. Roebling's Sons Co. have and recover from the Noonday Mining Co. the respective sums demanded by them, and directed that the mill and tramway and the interest of the Noonday Mining Co. in the land upon which such improvements are situated be sold to satisfy said sums found to be due each respectively, and if, after paying the amounts thus awarded, any surplus of the proceeds of the sale of such property remain, that the same should be paid to the Noonday Mining Co., its successors or assigns; but the decree contains no provision for an execution against its other property in case of deficiency. Notwithstanding the recital therein with respect to the sums found to be due plaintiff and the defendant the John A. Roebling's Sons Co. may have the appearance and partake of the form of a personal judgment, an examination of the tenor of the decree, considered in its entirety, conclusively shows that such was not the intention of the court in rendering it.

5. It is insisted that no decree can be rendered against the owner of the property charged with a lien in excess of the contract price of the improvements made thereon; that our mechanic's lien law was copied from the California statute, and, having been so construed in that state prior to its adoption here, our statute should receive the same construction; and, this being so, the complaint failed to state facts sufficient to constitute a cause of suit in not alleging that the amount demanded by the lien claimants was due from the Noonday Mining Co. to the Hammond Manufacturing Co. The point contended for is without merit, for, while the legislative assembly of this state passed an act December 22, 1853, section 11

of which provided, in effect, that the owner of a building should not be liable to a lien claimant for labor performed upon or material furnished to a contractor or employer in any greater sum than that due from the owner to such contractor or employer (Gen. Laws, p. 653, as compiled by Matthew P. Deady and Lafayette Lane), such act has been amended, and now provides that no payment made by the owner to any contractor before the expiration of thirty days from the completion of the structure shall be valid for the purpose of discharging any lien, unless such payment has been distributed among those who have labored upon or furnished material to be used in such structure: Hill's Ann. Laws, § 3678. No defense having been made as to the merits of the lien claims, the decree is affirmed. **AFFIRMED.**

Argued 24 April; decided 12 May, 1900.

HESS v. GERMAN BAKING COMPANY.

[60 Pac. 1011.]

ABUSE OF PROCESS—MALICE—PROBABLE CAUSE.

In an action to recover damages for wrongfully suing out an injunction, malice and want of probable cause must be alleged and proved.

From Multnomah: E. D. SHATTUCK, Judge.

Action by Elizabeth Hess, administratrix, against the Oregon German Baking Co. From a judgment for plaintiff, defendant appeals. **REVERSED.**

For appellant there was a brief over the name of *Cake & Cake*.

For respondent there was a brief over the name of *Flegel & Stanislawsky*.

MR. JUSTICE BEAN delivered the opinion of the court.

This is an action to recover damages alleged to have been sustained by the wrongful issuance of an injunction in a suit brought by the defendant corporation against the plaintiff's intestate. As originally filed, the complaint contained an allegation that such suit was malicious and without probable cause; but after the jury had been impaneled, and before any testimony was offered, the court, on motion of the plaintiff's counsel, struck out the allegations therein charging malice and want of probable cause, on the ground that an injury suffered by a malicious prosecution dies with the person injured. The defendant thereupon objected to the admission of any testimony, because the complaint as thus amended did not state facts sufficient to constitute a cause of action, which was overruled. Motions for nonsuit and for judgment notwithstanding the verdict were afterwards made for the same reason, and overruled. We have, therefore, presented the simple question as to whether an action will lie to recover damages from a party who wrongfully sues out a writ of injunction, without alleging and proving malice and want of probable cause. It is an elementary rule of law that no action can be maintained for an injury caused by legal proceedings, except the process of the court is abused through malice and without probable cause. The established remedies are open to every litigant, without penalty, except costs and such damages as are incident to the remedy chosen, unless they are resorted to for the purpose of harassing or injuring the defendant. "It is well settled," says CHALMERS, J., in *Manlove v. Vick*, 55 Miss. 567, "both at common law and under statutory provisions requiring the giving of bonds as conditions precedent to obtaining certain statutory writs, that no action can be maintained against the

party issuing the writs, except by showing malice and want of probable cause in their issuance. For the wrongful bringing of the common law actions, the compensation to the defendant is the recovery of costs. In the other class of actions the recovery of damages sustained must be upon the bond given by the party who invoked the statutory writ." This is the rule laid down by all the authorities: 10 Enc. Pl. & Prac. 1118; *Burton v. St. Paul, etc. Ry. Co.* 33 Minn. 193 (22 N. W. 300); *Robinson v. Kellum*, 6 Cal. 399; *Keber v. Mercantile Bank*, 4 Mo. App. 195; *King v. Montgomery*, 50 Cal. 115; *Lawrence v. Hagerman*, 56 Ill. 68 (8 Am. Rep. 674); *Lindsay v. Larned*, 17 Mass. *190. There is some conflict between them as to whether the common law remedy is not merged in the action upon a bond given under a statute to cover damages, but that question is not involved here. It follows that the judgment of the court below must be reversed, and it is so ordered.

REVERSED.

Argued 20 February; decided 23 April, 1900.

ROSEBURG RAILWAY COMPANY v. NOSLER.

[60 Pac. 904.]

87	299
40	553
40	555

DEFECTIVE COMPLAINT CURED BY VERDICT—WAIVER.

1. An incomplete statement of a cause of action is cured by the verdict where the issue of fact involved was made by the answer and reply, and was fully tried on the testimony without objection: *Nicolai v. Krimbel*, 28 Or. 76, applied.

CONSTRUCTION OF RAILROAD SUBSIDY CONTRACT.

2. In construing a subsidy contract conditioned on construction of a railroad within a specified time, unless the delay was caused by procuring rights of way, collections of subsidy, "or other just cause," delays in construction caused by rainy and inclement weather are not a sufficient excuse for nonperformance within the stipulated time, since the term "other just cause" means delays by reason of defendant's acts, or of the law, or by an act of God, and not those caused by ordinary inclement weather, which the parties must have anticipated.

From Coos: J. C. FULLERTON, Judge.

This is an action by the Coos Bay, Roseburg & Eastern Railway & Navigation Co. against J. H. Nosler upon a subsidy agreement made by the defendant in June, 1890, by which he agreed to pay plaintiff the sum of \$1,000 in consideration of its building a railroad from Marshfield to Myrtle Point, in Coos County, on or before January 1, 1891, and to Roseburg, in Douglas County, by December 31 of the same year; payment to be made in installments as the work progressed. Subsequently the contract was modified by extending the time for the completion of the road to Myrtle Point to May 1, 1891, and to Roseburg one year from the time it reached Myrtle Point, and providing that "in case any delay is caused by reason of the procuring of the rights of way, collection of Coos County or Roseburg subsidy, or other just cause, that the aforesaid times shall be extended a reasonable time further, to cover such delays. This is upon the understanding that the survey be commenced immediately, and work follow without delay." Both the original contract and the modification thereof are set out in full and construed in the opinion on the former appeal: *Coos Bay R. R. Co. v. Nosler*, 30 Or. 547 (48 Pac. 361). In addition to the facts there stated, the complaint avers, in substance, that the plaintiff has fully performed all the terms and conditions of the agreement on its part to be performed, whereby there have become due and payable to it, according to the terms of the contract, the following sums, to wit: On February 5, 1891, \$250; November 30, 1891, \$200; July 12, 1893, \$250; July 19, 1893, \$200; August 25, 1893, \$100,—and that defendant has not paid the same, or any part thereof, except the sum of \$250, paid February 5, 1891, and that there is now due and owing to the plaintiff \$826.10, for which judgment is asked, with interest.

After the case had been remanded from this court to the court below, the defendant, by permission, filed an

amended answer, in which he admits the execution of the subsidy contract and the modification thereof as alleged, and the construction by the plaintiff of its road from Marshfield to Myrtle Point, but denies that it has fully or at all performed the terms or conditions of the contract, or that there is any amount now due from him thereon, and, for an affirmative defense, alleges that it is one of the conditions of the contract that the road should be completed to Myrtle Point by May 1, 1891, but plaintiff failed and neglected to perform such condition, and did not complete the road to Myrtle Point until August 25, 1893; that its failure in that respect was not caused by any delay in procuring rights of way, collection of Coos County or Roseburg subsidy, or other just cause, but was wholly the fault and negligence of the plaintiff, and therefore it ought not to be allowed to prosecute this action. The reply puts in issue the allegations of the answer, and further avers that the defendant ought not to be permitted to set up as a defense that the road was not completed to Myrtle Point until August 25, 1893, for the reason that he had agreed, as set forth in the complaint, that in case any delay should be caused by reason of procuring rights of way, collection of Coos County or Roseburg subsidy, or other just cause, the time should be extended a reasonable time to cover such delays; that the plaintiff was delayed in the prosecution of its work on account of the matters set forth, and "by reason of extreme bad weather, incessant rains, floods, and frequent storms." Upon the trial the plaintiff was permitted, over the defendant's objection and exception, to give evidence tending to show that delay in the work was caused by stormy and inclement weather; and the court instructed the jury that the second agreement extended the period for finishing the road to Myrtle Point from May 1, 1891, for a reasonable time to cover delays "in securing rights

of way, in the payment of the subsidy, and on account of storms and floods," or other just cause, which it defined as "any circumstance unforeseen by the parties at the time, necessarily causing delay, and which [may] have happened without plaintiff's fault," and refused to instruct, as requested by the defendant, that "rainy, wet, inclement weather, such as we usually have during the fall and winter months in this county, could not be considered an act of God, and cannot be considered by you as an excuse for plaintiff's delay." The jury returned a verdict in favor of plaintiff for \$600, upon which judgment was duly rendered, and defendant appeals. REVERSED.

For appellant there was a brief over the names of *Andrew M. Crawford*, *A. J. Sherwood*, and *Watson & Beekman*, with an oral argument by *Mr. Edward B. Watson*.

For respondent there was a brief over the name of *J. W. Bennett*, with an oral argument by *Mr. J. S. Coke*.

MR. JUSTICE BEAN, after stating the facts in the foregoing language, delivered the opinion of the court.

1. It was held on the former appeal, and is the law of the case, that, while the plaintiff had a right of action against the defendant on the subsidy contract for any installment earned by it prior to the time fixed for the completion of the road to Myrtle Point, it cannot recover installments where the designated performance had been delayed beyond the time fixed in the contract. It is therefore claimed by the defendant that, inasmuch as the complaint shows on its face that but one installment was earned within the time specified, which was paid, and fails to allege that the delay in the completion of the road was on account of any of the causes specified in the contract, it does not state a cause of action. But the point

is made for the first time in this court, so that the defect, if any, is cured by the verdict. The complaint alleges full and complete performance by the plaintiff. This is denied by the answer, and, as an affirmative defense, it is alleged that the delay in the completion of the road was not on account of the causes specified in the contract, but was owing wholly to the negligence of plaintiff. The cause of the delay was thus made an issue, and tried without objection, and the defective statement of a cause of action in the complaint, if any, was thereby waived: *Houghton v. Beck*, 9 Or. 325; *Davidson v. Oregon & Cal. R. R. Co.* 11 Or. 136 (1 Pac. 705); *Aikin v. Coolidge*, 12 Or. 244 (6 Pac. 712); *Nicolai v. Krimbel*, 29 Or. 76 (43 Pac. 865).

2. But the court was in error in ruling that delays in the construction of the road caused by rainy and inclement weather were a sufficient excuse for nonperformance of the contract by the plaintiff within the stipulated time. It is an elementary rule of law that, whenever a party by his contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding delays from any cause, for he might have provided against them in his contract: *Oakley v. Morton*, 11 N. Y. 25 (62 Am. Dec. 49). And therefore the plaintiff was bound to complete the road to Myrtle Point by the first day of May, 1891, unless its failure to do so was on account of some of the stipulated causes specified in the contract, none of which include delays on account of the ordinary conditions of the weather. It is stipulated that delays caused on account of procuring rights of way, collection of Coos County or Roseburg subsidy, or other just cause, shall operate as an extension of the time specified, a reasonable time on account thereof. But the term "other just cause" means delays by reason of some act of the defendant, or of the law, or by an act of God, and does

not include those caused by ordinary weather, because the parties to the contract must have anticipated delays from such a source, and, not having stipulated in reference thereto, the plaintiff was required to complete the road within the time fixed, notwithstanding the ordinary condition of the weather. For this reason, the judgment of the court below must be reversed, and the cause remanded for a new trial, and it is so ordered.

REVERSED.

Decided 12 May, 1900.

EX PARTE MILLER.

[60 Pac. 999.]

DISBARMENT OF ATTORNEY—OBSTRUCTING COURTS OF JUSTICE.*

An attorney who has advised and assisted his client to disobey an order of court requiring her presence before the judge, after the order had been served on the client, and she had generally appeared in answer thereto, is guilty of intending to cause a failure of justice and should be disbarred.

Disbarment proceedings by the State of Oregon, on the relation of Rangdina Rivers, against J. E. Miller, an attorney at law.

DISBARRED.

For the relator there was a brief and an oral argument by *Messrs. D. R. N. Blackburn*, Attorney-General, *Lionel R. Webster*, and *Thos. G. Greene*.

For the defendant there was a brief and an oral argument by *Messrs. John H. Raley* and *A. D. Stillman*.

PER CURIAM. This is a proceeding for the disbarment of the defendant, who is a regularly licensed attorney of this court. The information charges him with a violation of his official oath, a willful disobedience of the order of the court, and of willful deceit and misconduct in

*NOTE.—A note collecting many cases on the disbarment of attorneys for unprofessional conduct is printed in 45 Am. St. Rep., at pp. 81 and 82.

his profession. The specifications, briefly stated, are as follows: That a judgment was given and rendered in the Circuit Court of the State of Oregon, for Umatilla County, in favor of one Emma M. Kenney and against Frank Rivers, the husband of the relator, for \$850; that execution was issued thereon March 23, 1895, by virtue whereof the sheriff levied upon certain money of the judgment debtor in the hands of Rangdina Rivers, and on June 20, 1895, judgment was entered against her as garnishee for the sum of \$365.50 in favor of the said Emma M. Kenney; that on July 23 execution was issued on the garnishee judgment, and such supplementary proceedings were had in aid of said execution as that the Circuit Court of the State of Oregon, for Umatilla County, made an order requiring the said Rangdina Rivers to attend before it on the twenty-fourth day of July, 1895, at 7:30 o'clock P. M., to be examined touching her property; that by the same order she was enjoined and restrained from making or suffering any transfer of, interference with, or other disposition of her property until the further order of the court; that this order was served upon the defendant July 24, 1895; that the said Rangdina Rivers appeared at the time directed, with the defendant, J. E. Miller, as her attorney, and the examination was continued until July 27, 1895; that on the last-named date another continuance was had until the twenty-ninth of July, 1895; that at the time of these continuances the judge, in the presence of defendant, further ordered and directed that the said Rangdina Rivers should not dispose of any of her property, or leave the County of Umatilla, State of Oregon, and should appear for further examination on the twenty-ninth of July, 1895, at the hour of 9 o'clock A. M., which orders, in the presence and hearing of the judge of the court, she promised to

observe, and was thereby relieved of the necessity of giving bail for her appearance; that the defendant was her attorney in all of these proceedings; that on the night of July 27, 1895, while said orders were in force, the defendant went to her house and told her that she must not appear in said court on July 29, 1895, as directed, but that she should leave the county and state at once, and that she should not pay said garnishee judgment; that, if she appeared in said court at the time mentioned, she would be asked three questions, the answers to which would convict her of a great crime and send her and her husband to the state penitentiary; that she was alarmed by said advice, and, acting in obedience thereto, she left the state upon the night of July 27, 1895, and went to Nelson, British Columbia, where she took an assumed name, as advised by the defendant; that the defendant agreed to send her certain personal property which she had left in his possession; that prior to her departure the defendant went to Walla Walla, and advised her husband, Frank Rivers, to leave the state at once, for the purpose of avoiding the service of a warrant then out for his arrest; that the said Miller did knowingly, willfully, fraudulently and unlawfully procure the absence of the said witness, Rangdina Rivers, on the twenty-ninth of July, 1895, with intent to unlawfully violate the orders of the circuit court, and to compass a failure of justice; that the said Miller, instead of sending the personal property as he had agreed, divided the same between himself and others, and at divers times refused to send the same, or any part thereof, to her, and held it for ransom, exacting \$30, which she did not owe him; that said advice by Miller was given with intent to prevent said Rangdina Rivers from paying the garnishee judgment, and to convert her property to his own use; that, while absent from the state by his advice, he wrote her a letter unbe-

coming an attorney and unprofessional in tone, for the purpose of blackmailing, intimidating and coercing her, through fear, to pay him money that she did not owe, and of preventing her from returning to Pendleton and repossessing herself of said property.

Analyzed, the charges consist (1) of unlawfully procuring the absence of the relator, an execution debtor, contrary to the order of the court requiring her to appear for examination at a time stated, with intent to cause a failure of justice;* (2) of willfully and unlawfully obtaining from the said Rangdina Rivers the personal property described in the complaint, with intent to defraud her thereof and to wrongfully convert the same to his own use; and (3) of endeavoring to extort money from her which she did not owe. The proofs having been submitted, we are to determine whether these charges, or any of them, have been established.

It appears by the records of the court, introduced in evidence, that Emma M. Kenney obtained a judgment in the Circuit Court of the State of Oregon, for Umatilla County, against Frank Rivers, for the sum of \$760.20, with attorney's fees and costs, on March 23, 1895. Execution was subsequently issued, and a garnishee notice served upon the relator. On July 12 the execution creditor filed the following allegations and interrogatories, viz.: "That the said Rangdina Rivers on or about the twenty-ninth day of June, 1895, received of the defendant Frank Rivers the sum of \$365.50, which sum of money was placed in the possession and keeping of the said

*NOTE.—Section 1047, Hill's Ann. Laws, provides: "An attorney may be removed or suspended by the supreme court for either of the following causes, arising after his admission to practice: * * * (3) For being guilty of any willful deceit or misconduct in his profession; (4) for a willful violation of any of the provisions of section 1038." Section 1038, Hill's Ann. Laws, has these provisions: "It is the duty of an attorney,— * * * (2) to maintain the respect due to the courts of justice and judicial officers."—REPORTER.

Rangdina Rivers by the said Frank Rivers, and which money was the property of the said Frank Rivers; that the said Frank Rivers received the said money from the sale of a certain wheat receipt to one W. S. Byers, in the City of Pendleton, Umatilla County, State of Oregon, on or about the twenty-ninth day of June, 1895. The garnishee defendant, Rangdina Rivers, is requested to answer the following interrogatories: (1) Did you receive the sum of \$365.50 on or about the twenty-ninth day of June, 1895, from the defendant Frank Rivers? (2) Did you not testify upon direct examination before T. G. Hailey, referee, in supplementary proceedings to execution in this action, that you received the said sum of \$365.50 from the defendant Frank Rivers? (3) What have you done with the said sum of \$365.50 which you so received from the said Frank Rivers? (4) Is the said sum of \$365.50, or any part thereof, now in your possession or under your control? If so, where is it?" On July 13 Mrs. Rivers made answer, under oath, as follows: To interrogatories No. 1 and No. 2: "Yes." To interrogatory No. 3: "I had the money in my home, as I testified to in answer to one of your interrogatories on direct examination before Referee T. G. Hailey. That said money was in the house at the time I so testified, but has since been removed by some person other than myself, and without my authority or license, and I am unable to answer whether my husband, Frank Rivers, took the money from the house or not." To interrogatory No. 4: "No; I have not the said sum of \$365.50, mentioned and described in plaintiff's interrogatories filed herein, or any part thereof. That I have not in my possession now, nor since July 9, 1895, said sum, or any part thereof, or any other moneys, goods, wares or chattels belonging to said defendant Frank Rivers. That I first discovered that the said money (\$365.50) was gone from the

place where I kept it on July 8, 1895. That I am unable to say where said sum of \$365.50, or any part thereof, now is. It is not in my possession." On July 23 judgment was rendered against her as garnishee, and in favor of Emma M. Kenney, for the sum of \$365.50 and costs. Upon this judgment an execution was issued, and with referehce thereto the following order was made, viz.: "Motion having been made in this action for the examination of Rangdina Rivers, the above-named garnishee defendant, in supplementary proceedings to execution, and said motion coming on to be heard (S. A. Newberry and Bailey, Balleray & Redfield appearing for plaintiff), and based upon an affidavit of S. A. Newberry filed herein, it is ordered that the said Rangdina Rivers is hereby required, in pursuance of law, to attend before me at the court house in Pendleton, Umatilla County, State of Oregon, on the twenty-fourth day of July, 1895, at 11:30 o'clock A. M., to be examined concerning her property. It is further ordered that the said Rangdina Rivers and all other persons be, and they are hereby, enjoined and restrained from making or suffering any transfer of, or any interference with or disposition of, the property of the said Rangdina Rivers until the further order of this court. Done and dated in open court at the court house in Pendleton, Umatilla County, State of Oregon, this twenty-third day of July, 1895."

This order was served upon Mrs. Rivers on the twenty-fourth, and the relator testifies that she appeared before the court at the time designated, but that the defendant did not then appear for her, he having gone to Walla Walla to see her husband, Frank Rivers, and because of his absence the further hearing was postponed until July 29 at 9 o'clock in the morning, and that the court then issued an injunction restraining her from disposing of her property, and directed her not to leave the

State of Oregon, on pain of arrest for contempt; that the relator next saw the defendant on July 25, told him of the order that had been made, and thinks she had the order and showed it to him; that on Friday evening following he told her that she would have to leave the state and go to British Columbia, and assigned as a reason therefor that there was a warrant out for her husband, and that if the sheriff could not secure his arrest he would arrest her, and probably confine her in jail for a year or so, but was likely to make short work of it and send her to the penitentiary; that there were three questions to be asked her, the answers to which would convict her and send her to the penitentiary; and, when asked what the questions were, he replied that she should not ask anything; that she should either choose between his advice, or go to the penitentiary. She further testifies that he told her she could not take anything with her, and that she must leave her property with him, and go beyond the United States, and take an assumed name; that he would secure a driver, with team and carriage, to take her out of town on Saturday evening at 9 o'clock; that he procured the carriage as promised, and that Mr. James and he accompanied her part of the way up the railroad track, some two miles, to where he had the carriage, from which place she was driven to Walla Walla, where she took the train for Spokane, proceeding on to Nelson, British Columbia; that when she arrived at Nelson she took the name of Mrs. A. C. Holmes, and directed defendant to write to her by that name; that before her departure she intrusted all her personal property to him,—part of it being left in the hands of T. E. James, and part with Mrs. Rouch; that he took away two bundles, which contained the best she had; that all of the property, valued at half price, would amount to about \$1,000; the articles being the same as contained in the list made a

part of the information ; that, although she had repeatedly requested the defendant to send the property to her, he refused to do so unless she would pay him the sum of \$30, which she denies that she owed him, but that she subsequently consented to pay that sum on condition he would send the goods to her C. O. D., but that he still neglected to send them, and has since disposed of them. On cross-examination she testifies that the defendant had taken away most of her property before the twenty-fourth of July, but that, after she had been ordered not to dispose of it or to leave the state, he took away a satchel containing silverware and jewelry. T. E. James vaguely corroborates Mrs. Rivers' testimony, but, except as it pertains to matters which are practically admitted, his testimony is largely hearsay, and so indefinite as to render it of but little importance. No good result can therefore be obtained by a review of it here.

On August 4, 1895, the defendant wrote to Mrs. Rivers, under the name of Mrs. A. C. Holmes, at Nelson, British Columbia, as follows : "Yours of the thirty-first of July received yesterday, and in reply will say that I have understood warrants were out for the arrest of you and Frank, both ; charging larceny against Frank, and charging you with aiding and assisting him in committing larceny. However, I cannot find out anything from any one in the sheriff's office. I have not heard a word from Frank, and still have my doubts whether I shall ever hear from him. I do not think safe for you to return to Spokane for a long time. If you can manage in some way to quietly pass through the place, and go on to Victoria or some of the coast towns, I think it would, without doubt, be better, but for the present I think you had better remain out of the United States. You might arrange after a few months to go to Colorado, where your brother is, without trouble. Redfield was very angry to

think that you had slipped from his hands, and left them nothing but the costs to pay, and get no returns therefrom. They had Mr. James up, to tell what [he] knew about your departure. But, of course, he had no information to give them. And that has been the end in that respect. They have not as yet taken any of your goods, but may attempt to do so the coming week. Be of good cheer, and make the best of your situation for the present, and they will, without doubt, try to do all they can; and, when they have finished, then we will act. Should you go to any new place, let me know at once, so that I can be on the lookout for breakers. Everything has worked well thus far in your escape from your persecutors. Now, don't let any rash move undo all that has been done." Subsequently, on October 11, he wrote again to her (directing the letter, "Mrs. R. Rivers, Nelson, B. C."), as follows: "I have been informed that you have made some threats concerning myself and others, and threat to make a confession. * * * Now, if you have gone so far as to make a threat against me or any of my friends, I will tell you that I will save you of all such trouble. I will go to Mr. Redfield and tell him that you left a lot of goods with me as a pledge for my fees, and that, if he will give me the \$30 due me, he may have the goods and do as he chooses with them. Now, you nor no other person can say that I have ever betrayed any confidence reposed in me, either as attorney or friend (and I have been both to you); but, unless you apologize and make matters satisfactory at once, I shall not consider that I am under any further obligations to you, either as an attorney or friend, and will proceed at once to get my money out of the goods which I hold of yours. I would not have been as easy with you as I have been, but for the reason that I felt that your husband and Mr. Redfield, and those with him, had greatly wronged you. * * *

I do not know of what you can confess, except that you left this state ; and, while I never have felt that you were to blame for matters as they were, I do not see why you should betray your friends and assist your enemies. Now, you give me written authority to open that little grip which I have, and make a list of everything which you pledged to me for my fees, and secure me the sum of \$30 and all costs of expressage and duty upon goods, so that I will be safe, and you will have your goods shipped at once. This cannot be said to be in any wise unreasonable, by you or any one else. I will give you until the twentieth of this month, unless I should hear of some more threats. But, if there is no more of them, I will not offer your goods until after the twentieth to Mr. Redfield."

Later on he wrote to Mr. J. F. Hume, at Nelson, British Columbia, as follows : " There is a woman in your town with whom I had some business as her attorney, and she placed some goods with me as a pledge for my fees. She was in a very bad situation, and I took the property for two reasons : One was to keep those who were endeavoring to force the collection, which claimed at the time she had nothing whatever to do with, and that only her husband was responsible for ; and, further, to secure myself. And the agreement was that the property should not pass out of my possession until all claims which I might have against her was fully paid. There is \$30 due me, and that is a very small amount for the labor performed. * * * Now, as soon as she complies with her own voluntary agreement, I am will[ing] and will be glad to send her her goods. There is a little grip, among other things, that she claims contains jewelry. It is locked, and I never have seen its contents. Now that she has requested me to send these goods C. O. D. to you, I will say this : That if she will send me a list of the ar-

ticles, and their probable value, and authority to open the package she claims contains jewelry, so that I may check it off and make the proper invoice to entitle it to pass the custom house, and secure me in some way against any liability for any of the charges upon the same, I will ship the goods to you at once C. O. D., for my fees, but not otherwise. I will inclose a letter with this, to her, which I hope you will see that she gets." And on October 12 he wrote again to Mrs. Rivers, as follows: "Your insulting letter addressed to my wife was received by her to-day, and given to me for the purpose of answering, and in reply will say: Neither my wife or children have ever worn any garment or article that ever belonged to you or any of yours. But, upon the contrary, they have had to do without, on account of your not paying your honest debts. I have always thought up to this time that you were a lady, and had been greatly imposed upon by your husband, and entered into your defense believing that I was defending a lady who had no intention of doing a single wrong act. I am now compelled to believe that you are no better than the man you called your husband, and that in many respects you have been equally guilty as he. Now, you are wanted bad in this place for swindling, and as being an accomplice with your husband in all his escapades. And those who were chasing you up while I was thinking that I was defending an innocent woman claim that they have several good cases against you for false swearing. * * * Now, if you want your goods sent right away, give me your guaranty that my money is secure, and that I will be secure from any duty at the custom house and expressage upon your goods, and I will assure you that I will not delay sending you everything I have of yours, and be glad to do so. But any more nonsense or delay upon your part

means that I will turn them over to Mr. Redfield, who holds a judgment against you for \$400 or \$500, and will be glad to get even a part of it."

The defendant testifies that the relator left with him a satchel containing silverware and jewelry, and two packages of goods, which he placed in a box and nailed up, and that all these goods were taken from him by the deputy sheriff of Umatilla County by virtue of an execution issued out of the circuit court in a cause wherein Peter West was plaintiff and Rangdina Rivers was defendant, and that they were sold at sheriff's sale, and the proceeds applied to the satisfaction of said execution; that he did not otherwise dispose of any of the goods; that the relator left goods with T. E. James and Mrs. Rouch, but that he had nothing to do with them, nor had he any control over them. He further testifies that he was in Walla Walla on the evening of the twenty-fourth of July, when Mrs. Rivers was required to appear in court; that he did not then appear for her; that she told him that the matter had been continued until the twenty-ninth, but that he could not find that such was the case from the records of the court; that the relator delivered the goods which he received from her into his possession several days before the order of the twenty-third was made or served upon her. He denies having advised or told her that she should not appear in the circuit court at the time of the alleged adjournment or any other time, or that he told her that, if she did appear, three questions would be asked her, the answering of which would send her to the penitentiary, or that he procured a driver, with team and carriage, to take her to Walla Walla, or that he advised her to go to British Columbia or to take an assumed name. He admits having written all the letters attributed to him and referred to herein, and he further testifies that she owed him \$30 for pro-

fessional services, consisting of a charge of \$10 for appearing in the proceedings supplemental to execution, and \$25 for making a trip to Walla Walla at her instance to interview her husband; that, of these sums, \$5.00 had been paid, leaving the balance due as above stated. He states the purpose of his trip to Walla Walla as follows: "Mr. Redfield and a number of persons had told me that if Mr. Redfield procured judgment against her, and it was not paid immediately, he would proceed against her for perjury, and the morning that the judgment was obtained against her I told her of the rumors that I had heard, and she had denied knowing where her husband was up till that time, but she said she received a letter from him that morning (he was in Walla Walla); and she also claimed that he had gone into her bureau drawer and stolen several hundred dollars, and that he had all her money; and I advised her to either go herself, or send some one, and get him to let her have enough money to satisfy that judgment; that she could do that quicker and easier than she could defend herself against a criminal prosecution. And that was the occasion of my being away at that time." He further says that she requested him to go, and there was nothing said about fees, but that he was acting as her attorney, and simply did it as part of his work. He testifies touching his charges that as soon as he looked into the papers he was satisfied that there would be considerable work to be done, and, she not having paid him the full amount of the \$10 formerly charged, he thought it advisable to have some security for his fees for what he had done and was to do, and that she delivered certain property to him for that purpose, but at the same time she put in a number of things for safe keeping, and that he was careful to get the property before there was any judgment taken against her.

We come now to apply the proofs to the specifications, and determine whether they have been substantiated thereby. Mrs. Rivers was an execution debtor, and had been cited to appear on July 24 to be examined concerning her property. The order requiring her appearance contained also an injunction against her transferring or disposing of any of her property. The defendant was her attorney in the proceeding, and had been for some time. He had drawn her answer in the garnishee proceeding, and a judgment was obtained thereon against her for the amount of money alleged to be the property of her husband, and then in her possession; the defendant being present as her attorney when the judgment was entered, and having heard the announcement thereof in court. The judgment was evidently rendered on the twenty-third of July, although the findings of the court bear date the twenty-fourth. The order for Mrs. Rivers' appearance for examination was undoubtedly made subsequent to the entry of this judgment, it being made in a proceeding supplementary to an execution issued upon the judgment. Of this order the defendant professes to have had no personal knowledge at the time, although Mrs. Rivers testified that she thinks she showed it to him. Mrs. Rivers appeared at the time designated in the order for examination, but the defendant was not then present; and she says the hearing was postponed because of defendant's absence until July 29, at 9 o'clock in the morning, and that the court directed her not to dispose of any of her property, nor to leave the state, in the meanwhile. No such order was entered of record, however, and it does not appear that anything further was done in the premises, and, so far as our knowledge goes, the matter is still pending. It is not altogether clear from the information which of these orders it was designed to charge the defendant with having caused the relator to disobey. The

alleged order requiring her not to leave the state seems never to have become a part of the records of the court in the cause, although there is evidence that it was verbally made and was announced by the court, and it is doubtful whether the charges can be sustained in so far as it was designed to make this order the basis thereof. But the order requiring her appearance for examination was still operative. The relator had appeared in obedience thereto, and a postponement of the hearing was had; but the order had not been revoked, and she was as much bound to its observance after as before the postponement, the date of appearance only being changed. That the order of postponement was not entered of record ought not to change the condition, as it appears very clearly that such a postponement was had to the twenty-ninth of July, at the hour of 9 o'clock A. M. The charges are broad enough to comprehend the willful procuring of a violation of this order, as well as the alleged verbal order; and, if they have been proven in this particular, there is sufficient to support them.

The defendant admits that the relator told him the order had been made, and a postponement had. This caused him to examine the records for the order and the entry touching the continuance, but he says he could not find anything to confirm what she said, and therefore claims that he was without knowledge of the action and requirements of the court. Mrs. Rivers thinks she showed him the order, and it is quite probable such was the case; for, having been served with it, as the return of the sheriff shows, it is very reasonable to suppose that she had not parted with it so soon thereafter, and that the defendant's purpose in looking at the record was to determine for himself what subsequent orders had been made touching the postponement, and relating to her further appearance. Not finding any such, he may have

concluded that none had been made, notwithstanding her assertion to the contrary. But he was bound to take notice that the original order was in force, unless it had been vacated or discharged in the meanwhile. The defendant was well aware that the relator had left Pendleton, and was apprised of the manner of her going; for he accompanied her, according to his own admissions, to the place where the driver was waiting with a carriage to take her to Walla Walla, and helped her to enter the carriage. According to her testimony, he gave her a map, and marked the place where she was to go in British Columbia, and in this she followed his instructions. This he denies, but we find him writing to her under an assumed name very soon afterwards, at the point designated for her destination. Here is enough to show his complicity with the relator in her sudden departure from Pendleton for a place outside the jurisdiction of the United States. His letters, if there were nothing else in the record, are sufficient to show that he was culpably instrumental in procuring her nonappearance for further examination in obedience to the orders of the court. Perhaps it is not entirely patent that she left with the direct view of avoiding this especial order, or that such was his purpose in furthering her departure, but the effect was the same, and she was not absent for any legitimate purpose. The defendant denies that he advised her to leave at all; yet he admits that he imparted to her the information that she was liable to be arrested for perjury, and this lends color to the truth of her statement that he told her that, if she appeared in obedience to the order, certain questions would be asked her, the answering of which would send her to the penitentiary.

In his first letter, written seven days after her departure, he says: "I do not think safe for you to return to Spokane for a long time, * * * but for the present

I think you had better remain out of the United States. * * * Redfield was very angry to think that you had slipped from his hands, and left them nothing but the costs to pay, and get no returns therefrom. They had Mr. James up to tell what [he] knew about your departure. But, of course, he had no information to give them. And that has been the end in that respect. * * * Everything has worked well thus far in your escape from your persecutors. Now, don't let any rash move undo all that has been done." And again, when the relator had fallen out with him, and was pressing him to send her the goods which had been left with him, he writes: "Now, you are wanted bad in this place for swindling, and as being an accomplice with your husband in all his escapades. And those who were chasing you up while I was thinking that I was defending an innocent woman claim that they have several good causes against you for false swearing." These letters show, undeniably, the defendant's complicity with the relator's departure, and that such departure, if not expressly, was in part, for the purpose of avoiding further examination touching the money which she acknowledged receiving from her husband, and which she swore had been taken from her bureau drawer by some one unknown to her.

Without pursuing the matter further, we are of the opinion that the first specification of the charges has been amply proven. As it respects the other two, we think they have not. Whatever property was intrusted by the relator to the defendant was given into his charge before the order of July 23 was made. The essential part of this property was given to him as security for his fees, which she consented to pay him, so that we conclude the defendant was not guilty of defrauding her of the property, nor of attempted extortion from her of money that was not his due. In this connection it may be remarked

that the letters he wrote to her and to Mr. Hume indicate a very low estimate of the high duties which devolve upon an attorney, and of his just and honorable relations to his clients. There is here subject for reproof. But for the offense of procuring the absence of Mrs. Rivers in disobedience to the positive orders of the court, requiring her further examination in the proceedings supplementary to execution, he will be disbarred from practicing in the courts of this state, and such will be the order of the court.

ORDER OF DISBARMENT.

Argued 21 February; decided 12 May, 1900.

MERRIAM v. VICTORY MINING COMPANY.

[56 Pac. 75, 58 Pac. 37, 60 Pac. 997.]

WAIVING RIGHT TO APPEAL BY ACCEPTING PAYMENT.

1. While a party cannot appeal from a judgment in his favor after receiving the benefits thereof, his right of appeal is not waived where the amount accepted would accrue to him in any event, notwithstanding the appeal, which was for the enforcement of a disputed right to money in addition to the amount accepted.

87	321
40	598
37	321
44	376
37	321
45	496

DISMISSING APPEAL—VOLUMINOUS RECORD.

2. A motion to dismiss on the ground that appellant had no interest in the fund to be distributed will be continued until a hearing on the merits, where the record is voluminous.

DISMISSING APPEAL—EVIDENCE DEHORS THE RECORD.

3. Evidence outside of the record will not be received in the appellate tribunal to contradict the record of the court below; though such evidence may be considered to show material occurrences after the judgment or decree appealed from: *Ehrman v. Astoria Ry. Co.* 26 Or. 377, distinguished.

CORPORATIONS—PREFERRED CREDITORS*—OBLIGATION OF CONTRACT.

4. The priority sometimes accorded unsecured claims against corporations over prior contract debts is limited strictly to railroads, and on the ground that their continued operation is a matter of public concern; but it does not apply to claims against ordinary private corporations.*

ACCOUNTING BY RECEIVERS—RIGHT TO APPEAL.

5. A receiver may appeal from an order of the court directing him to pay over money in his hands, when such order erroneously fixes the amount in his possession, and directs him to turn over more than he has in his custody.

From Douglas: J. C. FULLERTON, Judge.

*NOTE.—On this question see the authorities collected in a monograph, "Claims Which Take Precedence Over Mortgages of Railways and Like Property:" 54 Am. St. Rep. at pp. 432, 433. See, also, note to *Farmer's Loan & Trust Co. v. Grape Creek Coal Co.* 16 L. R. A. 808, and *Hanna v. State Trust Co.* 30 L. R. A. 201.—REPORTER. 87 OR.—21.

Decided 13 February, 1899.

ON FIRST MOTION TO DISMISS APPEAL.

Suit by Phillip Merriam against the Victory Placer Mining Co., J. T. C. Nash, and others. From a decree directing distribution of the assets of defendant company, J. T. C. Nash appealed. Motion to dismiss appeal.

OVERRULED.

Messrs. O. P. Coshow and O. H. Irvine, for the motion.

Messrs. Geo. H. Durham and Wm. R. Willis, contra.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

In the course of litigation affecting it, S. W. Blaisdell was appointed receiver of the defendant corporation. During his management of the business of the concern as such receiver, many claims were presented to him for adjustment and payment; among them, the claims of Willis Kramer and nineteen others for labor and material, aggregating \$7,013.09. J. T. C. Nash also presented a claim for \$90,000 on account of certain bonds executed by the corporation, and secured by mortgage upon the real property of the concern; and Thomas E. Sturgeon for \$2,000, being the amount of four such bonds alleged to have been secured by the same mortgage. The receiver filed what was intended to be his final account in June, 1897; but this does not appear to have been acted upon by the court, and on January 6, 1898, he filed an account supplemental thereto, which together showed the condition and status of the estate at that time, including a list of all claims theretofore presented to the receiver for adjustment. A summary of the account is as follows:

Total cash received.....	\$ 50,815 19
Amount paid out under direction of the court.....	3,450 06
Balance in hands of receiver.....	\$ 47,364 23

Upon the final hearing and settlement of these accounts, the court below ordered and directed that the receiver pay—First, the additional expenses of the receivership, amounting to \$46.50; second, the labor and material claims due Kramer and others, amounting to said sum of \$7,013.09; and, third, to J. T. C. Nash the residue of the funds on hand, except the sum of \$3,500, which he was required to retain to await the final determination of certain proceedings instituted by one J. M. Stevenson upon alleged claims against the corporation and receiver, but that, in case such proceedings were not prosecuted with effect to final determination, then that said latter sum be also paid to Nash. From the order and decree thus entered, Nash appeals, and complains of the preference given the claims for labor and material over his. Later a cross appeal was filed by Sturgeon, who complains that his claim was not allowed to share pro rata with that of Nash in the surplus funds. It appears by a subsequent report of the receiver that Nash received from him, and receipted for, the sum of \$36,804.23, being all of such residue except the said \$3,500, prior to the institution of the appeal; and the labor and material claimants now move to dismiss upon the ground that the appellant has received and accepted the fruits of the decree appealed from, and has thereby waived and precluded his right to such appeal.

1. The rule is well settled in this state and elsewhere that a party who receives a substantial benefit or the fruits of the litigation cannot be heard to complain of the action of the court which gave him the award or judgment. The right to proceed upon a judgment or decree, and invoke the process of the court to that end, and thus acquire or otherwise secure and enjoy the fruits of such judgment or decree and the right to appeal therefrom, are nonconcurrent and wholly inconsistent; so that an election to enforce the edict of the court, and to secure

the benefits awarded, acted upon to the extent that an appropriation has been accomplished, is a renunciation of, and precludes, the right of appeal: *Moore v. Floyd*, 4 Or. 260; *Ehrman v. Astoria Ry. Co.* 26 Or. 377 (38 Pac. 306); *Bush v. Mitchell*, 28 Or. 92 (41 Pac. 155). The rule, however, does not militate against the right of appeal by a party who accepts the amount voluntarily tendered or paid on a judgment or decree. Such right is not inconsistent with the acceptance of the amount admitted to be due by the pleadings in the case (*Portland Const. Co. v. O'Neil*, 24 Or. 54, 32 Pac. 764; *Stemmer v. Scottish Ins. Co.* 33 Or. 65, 49 Pac. 588); the purpose of the appeal being the enforcement of a contested or disputed right, and such as is additional merely to that which is conceded by all parties to the litigation. In consonance with this right is the right also to accept the benefits awarded by the judgment or decree, and, at the same time, prosecute the appeal, where that which is awarded would accrue to the appellant in any event; that is, whether a reversal, modification, or affirmance be obtained: *Stemmer v. Scottish Ins. Co.* 33 Or. 65 (49 Pac. 588); *Hinchman v. Point Defiance Ry. Co.* 14 Wash. 349 (44 Pac. 867, 869); *In re Day*, 18 Wash. 359 (51 Pac. 474). Now, so far as the respondents the labor and material claimants are concerned, the appeal cannot affect the relief obtained by Nash. These claimants secured by the decree all they sought, to the full limit of the relief demanded; and the surplus only after satisfying them, save the \$3,500 directed to be retained to meet the contingencies subsisting, as it respects the Stevenson claims, is what the appellant was awarded. His appeal is prosecuted for the purpose of contesting the right of the labor and material claimants to what was awarded to them, and directed to be first paid out of the funds in the hands of the receiver. As between them and the appellant,

they could not recover any more or acquire any better or superior rights in any event; nor could it depreciate or detract from the amount accorded the appellant whether the claimants were successful or not in their resistance of the appeal. It is said, however, that, if Sturgeon should prevail in his cross appeal, it would depreciate from the amount awarded to Nash. But the answer to this objection is that Sturgeon is not seeking to have the appeal dismissed. In point of fact, his only remedy is in having the appeal prosecuted, especially upon his own part, to final determination, for the decree of the court below is against him. He is not complaining of the appeal, and the labor and material claimants cannot complain upon the ground that Nash has accepted benefits under the decree which belonged to Sturgeon, so long as he has accepted nothing of their seeking. In so far as the Stevenson claims are concerned, \$3,500 was especially reserved by decree of the court, which was supposed to cover all contingencies that might arise in any event respecting them; so that the acceptance of the award by Nash could not impair in any way the rights of Stevenson if he was complaining. At all events, Nash's receipt of the funds was not inconsistent with his right of appeal, as it may concern the claimants who are resisting his appeal by the motion to dismiss. The motion will therefore be overruled.

MOTION OVERRULED.

Decided 31 July, 1900.

ON SECOND MOTION TO DISMISS APPEAL.

Mr. O. P. Coshaw, for the motion.

Mr. Andrew M. Crawford, *contra*.

PER CURIAM. 2. This is a motion to dismiss an appeal from an order of distribution of certain funds in the

hands of a receiver on the ground that the appellant had no interest in or claim to the fund at the time the appeal was taken. The record is voluminous, and somewhat complicated, and we are of the opinion that the consideration of the motion ought to stand over until the cause is reached for hearing on the merits, and it is so ordered.

MOTION OVERRULED.

Decided 12 May, 1900.

ON THE MERITS.

For appellant Nash there was a brief and an oral argument by *Messrs. Geo. H. Durham* and *Wm. R. Willis*.

For appellant Blaisdell, as receiver, there was a brief over the name of *Andrew M. Crawford*, with an oral argument by *Mr. Edward B. Watson*.

For respondents, unsecured creditors, there was a brief over the names of *O. P. Coshow* and *C. A. Sehlbrede*, with an oral argument by *Mr. Coshow*.

Mr. JUSTICE BEAN delivered the opinion of the court.

On or about October 5, 1893, the defendant, the Victory Placer Mining Co., a corporation organized under the laws of the State of Illinois, purchased of the appellant Nash certain placer mining ground in Douglas County, and issued and delivered to him in part payment therefor \$90,000 in bonds, secured by a first mortgage on the property. The company immediately thereafter entered into possession of the mine, and continued to operate it until November 18, 1896, when, being insolvent, and unable to meet its obligations, S. W. Blaisdel was appointed receiver, and as such took charge of all the property of the corporation. At the time of his appointment the corporation was indebted to divers and

sundry persons for labor and supplies furnished and used in operating the mine in the aggregate amount of \$7,013.09, claims for which were afterwards presented to and allowed by the receiver. On December 21, 1896, Nash presented to the receiver his claim, duly verified, wherein he stated that in July, 1894, in a suit against the defendant corporation, it was decreed that the bonds held by him were given in part payment of the purchase price of the property, and were a first lien thereon, prior in time and right to the other bonds described in the mortgage and to all other indebtedness of the corporation. On April 23, 1897, the receiver, under an order of the court, sold the property of the corporation to Frank B. Smith, the agent and representative of certain of the bondholders, for \$50,000, and the sale was confirmed. On February 21, 1898, the court ordered the proceeds of the sale applied—first, to the payment of the expenses of the receivership; second, to the payment of the unsecured claims for labor and supplies furnished prior to the appointment of the receiver; and, third, the balance to Nash, except \$3,500, which the receiver was directed to hold until the final determination of certain proceedings then pending against him.

Thereafter, on June 9, 1898, upon the application of one of the unsecured, but preferred, creditors, the court ordered the receiver to pay into court within thirty days the amount due the labor and material claimants. On July 2, 1898, Nash appealed from the order of distribution, whereupon the receiver refused to pay the money into court, and on December 5, 1898, an order was made removing him from office, and requiring him to pay into court within ten days the sum of \$50,000, the proceeds of the property sold by him, less \$3,497.46, costs and expenses of the receivership as allowed by the court. Thereafter Nash, certain of the other creditors of the cor-

poration, and the receiver separately moved the court for a revocation of the order removing the receiver, and requiring him to pay the money into court, and in support thereof the receiver filed a report to the effect that, although he reported the sale as made for cash, no money was in fact paid, for the reason that the real purchasers were John Addison, William L. Breyfogle, and E. N. Camp, who, together with Nash, at the date of the sale owned all of the first mortgage bonds of the corporation except \$2,500, and all the other claims filed with the receiver, except the unsecured claims preferred by the order of distribution; that at the time of the sale it was agreed between such parties and the receiver that the amount of the bonds and claims held by them should be considered as an offset against any bid they should make or cause to be made for the property, so far as they should be adjudged valid by the court, and that Addison and Camp would advance and pay to the receiver from time to time all sums necessary to defray the expenses of the receivership, and which should be decreed by the court to be disbursed for any purpose whatever; that in pursuance of such agreement they paid to the receiver all expenses of the receivership and disbursements theretofore allowed by the court and directed to be paid, and had paid to Nash on his bonds the sum of \$36,804.23; that the receiver never actually had in his hands any sum of money, except as needed to pay expenses and the disbursements allowed and directed by the court to be paid, but treated the sale as cash for the reasons already stated, and therefore at no time had it been, or was it then, possible for him to comply with the order, and pay into court the amount of the bid, or any part thereof. An order was thereafter made allowing the receiver credit for \$36,804.23, paid to Nash on his claim, and for which he filed a receipt; but the

court refused to revoke the order removing him, and he appeals.

3. The unsecured, but preferred, creditors in the order of distribution of February 21, 1898, have filed a motion to dismiss the appeal of Nash on the ground that he had no appealable interest at the time it was taken. The evidence bearing upon this question is not in the record, but the fact is sought to be proven here by the affidavit of counsel, from which it appears that on the twenty-seventh of November, 1896, Nash entered into an agreement with John Addison to sell to him the bonds of the defendant corporation which he (Nash) held; that, after Nash had presented his claim to the receiver, and it had been allowed, and before the order of distribution, this contract was consummated, and the bonds sold and transferred by Nash to Addison. It is quite well settled that evidence of facts outside of the record, occurring after the rendition of the judgment in the court below, and which affect the proceedings of the appellate court, when deemed necessary, will be received and considered by such court for the purpose of determining its action: *Ehrman v. Astoria Ry. Co.* 26 Or. 377 (38 Pac. 306); *Dakota County v. Glidden*, 113 U. S. 222, 28 L. Ed. 981 (5 Sup. Ct. 428); *Elwell v. Fosdick*, 134 U. S. 500, 33 L. Ed. 998 (10 Sup. Ct. 598). But the record of the court below, upon which the appeal is based, cannot be contradicted or varied by an *ex parte* showing in the appellate court. From the affidavit filed in support of the motion to dismiss it appears that Nash sold and transferred the bonds, if at all, prior to the final decree of distribution in the court below; hence the effect of the showing made here is to contradict the order adjudging and decreeing that at the time of the distribution he was the owner of the bonds in question, and as such entitled to receive a share of the proceeds of the property. We are of the opinion, therefore,

even if it be conceded that the transfer by a party of his interest in the subject-matter of pending litigation requires the substitution of his successor in interest, and the subsequent proceedings to be had in his name (a question at least doubtful under our statute), *Elliot v. Teal*, 5 Sawy. 188 (Fed. Cas. No. 4389), that the motion in this case must be denied, because it is an attempt to contradict the record of the court below.

4. The remaining question, so far as Nash's appeal is concerned, is one of priority in the distribution of the proceeds of mortgaged property in the hands of a receiver between a mortgagee and unsecured claimants for labor and supplies furnished the mortgagor prior to the appointment of the receiver, and after the execution and recording of the mortgage. It is sought to sustain the decree of the court below by invoking the rule that the court appointing a receiver may, under certain circumstances, order and direct the payment of debts for labor or supplies contracted by a corporation within a limited period before the appointment of the receiver. But this doctrine is peculiar to railroads, and is nowhere applied, so far as we have been able to ascertain, to an ordinary corporation. It may be regarded as settled that, under special circumstances, the court appointing a receiver for a railroad may direct the payment out of the earnings of the road, or the corpus of the property, of a certain class of ante-receivership debts, notwithstanding the prior lien in favor of the mortgage bondholders: 20 Am. & Eng. Enc. Law (1 ed.), 417. But "this doctrine rests," says Mr. Chief Justice WOLVERTON, "upon the ground that the maintenance of the road and the prosecution of its business are essential to the preservation of the mortgage security. The primary object is to keep the enterprise a going concern, from considerations of both public and private interest:" *McCornack v. Salem St. Ry. Co.* 34 Or.

543 (56 Pac. 518). And Mr. Smith, in his work on Receiverships, says: "The reasons for these rules are that a railroad is a public concern, and is operated and kept in motion for the benefit of stockholders, mortgage bondholders and the public, all of which are interested in it as a going concern:" Smith, Rec. 575. The power of a court to appoint a receiver in a proper case is undoubted, but it has no general authority by reason thereof to affect vested rights, or the contract obligations of the parties.

"The appointment of a receiver," says Mr. Justice BREWER, "vests in the court no absolute control over the property, and no general authority to displace vested contract liens. Because in a few specified and limited cases this court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver acquires power to give such preference to any general and unsecured claims. It has been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. Indeed, we are advised that some courts have made the appointment of a receiver conditional upon the payment of all unsecured indebtedness in preference to the mortgage liens sought to be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot. So, when a court appoints a receiver of railroad property, it has no right to make that receivership conditional upon the payment of other than those few unsecured claims which, by the rulings of this court, have been declared to have an equitable priority. No one is

bound to sell to a railroad company or to work for it, and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception, and not the rule, that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens :'' *Kneeland v. American Loan Co.* 136 U. S. 89, 97 (10 Sup. Ct. 953).

It will thus be seen that the right of a court appointing a receiver to give priority of payment to unsecured debts over the lien of a mortgage is restricted to creditors of railroads which are public concerns, and is only exercised as to them under special circumstances, and in favor of a particular class of claims. As between creditors by mortgage and general creditors, the former are entitled to priority of payment out of the mortgaged property by virtue of their contracts and the law of the land, and the court has no authority to disregard their contract rights. It was so held even where a court had authorized a receiver, in order to prevent a threatened destruction of property, to borrow money for the purpose of paying unsecured debts, and to issue certificates therefor, containing on their face a declaration that they were issued for "a debt of the receiver incurred for the benefit and protection of the property in his hands, and a first lien thereon prior to the mortgage :'' *Raht v. Attrill*, 106 N. Y. 423 (60 Am. Rep. 456, 13 N. E. 282). See, also, *Phillips v. Wise* (Tex. Civ. App.), 31 S. W. 428. It follows, therefore, that the order of the court below giving to the unsecured claims for labor and supplies, however meritorious, priority over

the holders of the first mortgage bonds in the distribution of the proceeds of the mortgaged property, finds no support in the law, and cannot be sustained without destroying the sacredness of a contract obligation.

It is contended at the hearing that the mortgage did not cover all the mining property sold by the receiver; but there are no facts in the record upon which to base this contention. Indeed, the record indicates that the entire property was covered by the mortgage. It is so stated in the petition for the appointment of the receiver, the receiver's report, and in Nash's claim as filed with and allowed by the receiver.

5. A motion was also made to dismiss the appeal taken by the receiver on the ground that a receiver has no right of appeal from an order requiring him to pay funds in his hands into court. As a general rule, this is probably true; but it is held that, when the order erroneously fixes the amount of the property in his hands, and directs him to turn over more than he has in his custody, it is essential to the protection of his rights that he be allowed an appeal, and the law gives its sanction thereto: *How v. Jones*, 60 Iowa, 70 (14 N. W. 193). But, as the conclusion we have reached in reference to the distribution of the fund disposes of the interests of the contesting creditors, it is unnecessary to determine in this suit when and under what circumstances, if at all, a receiver may appeal from an order removing him.

It follows from the foregoing that the decree of the court below as to the distribution of the fund must be reversed, and a decree entered here directing its payment to the holders of the first mortgage bonds, less the unpaid costs and expenses of the receivership, to be ascertained and allowed by the court below.

REVERSED.

Argued 11 October; decided 29 October, 1900.

ALTONA v. DABNEY.

[62 Pac. 521.]

SERVICE OF PROCESS ON GARNISHEE.

1. A garnishee, being a disinterested stakeholder, cannot with safety to himself waive service of the process by which property in his hands is subjected to garnishment.

WAIVER OF SERVICE OF ALLEGATIONS AND INTERROGATORIES.

2. A garnishee may waive service of the allegations and interrogatories necessary to determine his liability and voluntarily appear as in other cases: *Carlier v. Koshland*, 12 Or. 492, followed.

From Multnomah: JOHN B. CLELAND, Judge.

Early in January, 1898, Theodore Altona, the plaintiff, commenced a suit in the Circuit Court of Multnomah County against Herman Vetter and A. L. McCully to foreclose a mortgage on real estate. McCully interposed a defense, to sustain which it was deemed necessary to show that he was a *bona fide* purchaser for value of the mortgaged premises; and the garnishee, P. P. Dabney, testified on the trial that McCully paid him, as agent for Vetter, \$1,000 on the purchase price. Plaintiff recovered judgment against Vetter for \$2,293.93. The premises were sold under the decree, leaving a balance still due on the judgment of \$221.13, and on June 25, 1898, execution was issued for the deficiency. The plaintiff, claiming that Dabney had never in fact paid Vetter the money received from McCully, caused a garnishment process to be served on him June 27. Dabney's certificate being unsatisfactory, the court, on July 2, made an order requiring him to appear on the ninth to be examined on oath concerning it. By this order, which was personally served on the garnishee the day it was made, the plaintiff was required to serve written allegations and interrogatories within three days from the date thereof, and they were placed in the sheriff's hands July 5. He was unable to make

service on that day, and the plaintiff obtained an *ex parte* order extending the time until the seventh. On the sixth the allegations and interrogatories were served upon the attorney for the garnishee, and on the eighth were filed in court, with the answer of the garnishee thereto. The allegations, in addition to setting out the decree against Vetter, the service of the execution upon the garnishee, and the subsequent proceedings therein, as before detailed, aver that on or about the twenty-fourth of December, 1897, Vetter sold and conveyed to McCully about two acres of land in or near Portland; that Dabney, the garnishee, was the agent of both parties in the transaction, and on or about the first of January, 1898, received from McCully, for the use and benefit of Vetter, \$1,000, as a part of the purchase price of such land; and that he had never paid the money so received by him, or any part thereof, over to Vetter. In his answer to the allegations and interrogatories, Dabney admits all the facts alleged by the plaintiff, except that he had never paid Vetter the \$1,000 received by him from McCully, which he denies. The case was tried upon this issue, without objection as to the regularity of the proceeding, and a decree rendered in favor of the plaintiff. A motion to vacate the decree for want of jurisdiction was subsequently filed and overruled, and the garnishee appeals.

AFFIRMED.

For appellant there was a brief over the names of *J. Thorburn Ross* and *E. B. Seabrook*, with an oral argument by *Mr. Seabrook*.

For respondent there was a brief over the name of *Davis, Gantenbein & Veazie*, with an oral argument by *Mr. Arthur L. Veazie*.

MR. JUSTICE BEAN, after stating the facts, delivered the opinion of the court.

The motion to vacate the decree was properly overruled. It is based upon the fact that the allegations and interrogatories were neither served within the time fixed by the court in the order for the examination of the garnishee, nor upon him personally; but his subsequent appearance by answer was a waiver of any irregularity in that regard. The allegations in a garnishee proceeding are essential to jurisdiction of the subject-matter: *Case v. Noyes*, 16 Or. 329 (19 Pac. 104), 16 Or. 539 (21 Pac. 46); *Smith v. Conrad*, 23 Or. 206 (31 Pac. 398). But jurisdiction of the person may be acquired by a voluntary appearance: *Carter v. Koshland*, 12 Or. 492 (8 Pac. 556).

1. A garnishee stands in the position of a disinterested stakeholder, and therefore, according to the great weight of authority, cannot waive service of the process by which the property in his hands, or the debt due from him to the principal debtor, is garnisheed: *Wade*, Attach. § 336; *Drake*, Attach. (6 ed.) § 451b; *Rood*, Garnish. § 286; *Raymond v. Rockland Co.* 40 Conn. 401; *Hebel v. Amazon Ins. Co.* 33 Mich. 400; *Nelson v. Sanborn*, 64 N. H. 310 (9 Atl. 721).

2. Proceedings subsequent to the garnishment, however, instituted for the purpose of ascertaining the truth or falsity of the garnishee's certificate, are personal to himself, and there is no reason why he may not waive the service thereof by a voluntary appearance, as in other actions or proceedings against him. It was so held by this court in *Carter v. Koshland*, 12 Or. 492 (8 Pac. 556).

The only contested question of fact in the case is whether Dabney paid the money received from McCully to Vetter before the service of the garnishment process upon him. He admits and alleges in his answer to the

allegations and interrogatories that McCully purchased the land of Vetter, and paid to him (the garnishee) \$1,000 on the purchase price thereof for the use and benefit of Vetter. In answer to the written interrogatories he says that, at the time of the payment by McCully, Vetter was in Los Angeles, California, and that he sent the money to him on March 11, 1898, by check of his (Dabney's) employer, the Title Guarantee and Trust Co. of Portland, on Ladd & Tilton, of that city. He was the only witness who testified on the trial concerning the matter, and we quote from his testimony: "Q. The money was sent to Mr. Vetter in what form? A. Sent in the form of a check. Q. Was the check ever cashed by Mr. Vetter? A. I think the same check was returned. Q. The same check was returned? A. Yes. Q. The same check that had been sent to Mr. Vetter by you was returned to you by him? A. The same check was, and sent through me. It was indorsed over to someone else. Q. Indorsed to whom? A. Mr. Burkhardt [the Assistant Secretary of the Title Guarantee and Trust Co., and who had charge and control of checks]. Q. Indorsed by whom? A. Mr. Vetter. * * * Q. Was there any understanding at the time that the \$1,000 was paid over that it should be returned? A. Well, there was a personal understanding to that effect. Q. Will you state fully what the understanding was in that regard? A. The understanding was this (I will have to tell you a little more in order to make that clear): That Mr. McCully, as to this particular property, was practically a figurehead, and the suit was brought to foreclose, making him a party, and he [Vetter] was in desperate circumstances. I saw him at that time. He was simply on the verge of suicide. He was a kind of sensational German. He had been trying to sell the place, and couldn't, and he wanted to gain time in the

suit, and he told me that he had actually executed a deed to me. That was the first thing I knew of it. I told him I didn't want him to do that; that I would get someone else to come if he wanted it. When he told me of this, no actual amount having been paid, I thought there was a chance of standing things off. I knew there was some deed, as I said before; but as to the particulars I was not fully advised. It was done in a hurry, and I wanted to save that man as much time in the suit as I could. It was to enable him to sell his place, and catch up. I wanted Mr. McCully to actually pass a valuable consideration. Knowing that you were to put me on the witness stand, I wanted to testify to the fact; and the \$1,000 was paid and returned. That was the purpose of it all. Q. It was the understanding when it was paid that it should be returned? A. Practically that was the understanding. Q. It was not paid until the eleventh of March? A. The money was sent away on the eleventh of March. It came back shortly after. It doesn't take long. Q. I mean the money that was paid by McCully about the eleventh of March. A. I think so. Q. Who furnished you the \$1,000? A. The money primarily was furnished by the Title Guarantee Co. I asked them to make an advance there for Mr. McCully for a few days. * * * Q. Was the check signed by the Title Guarantee Co. before sent off? A. I think it was. Q. You are not certain? A. Not quite. I didn't know at the time whether it ought to be signed or not, but I wanted it to be the actual thing, and then I thought, if it was lost in the mail, I thought it was best signed; and then I had Mr. Burkhardt's name put on the back as assignee, so that it could not be cashed by anyone else. * * * Q. Do you know where the check is now? A. I do not know. Q. Have you seen it since it was sent off? A. I saw it when it came back. * * * Q. So that whole trans-

action of the payment of that \$1,000 by A. L. McCully, as the consideration of the deed to him, and the payment to Vetter, was just a paper transaction, arranged for the purpose of that suit, was it? A. Well, practically so. I knew you people had put me on the witness stand before, and I expected you would do it again. Q. You fixed it up in the expectation of testifying to these things? A. Yes." This testimony requires no comment. It speaks for itself. There is but one conclusion to be drawn from it, viz., that the pretended payment of the money to Vetter was a "mere paper transaction," arranged for the purpose of concocting a defense to the foreclosure suit then pending, and that no payment was actually made, or intended to be made. Whether any money was in fact received by the garnishee from McCully is not open to consideration on this hearing. He not only admits, but affirmatively alleges, that he actually received \$1,000 from McCully for Vetter's use and benefit, and puts his whole defense to this proceeding upon the single issue as to whether he had paid the money over to Vetter, which he has utterly failed to maintain. The decree of the court below is affirmed.

AFFIRMED.

Decided 15 October, 1900.

ROBERTSON v. ROBERTSON.

[62 Pac. 377.]

PROVING PAYMENT WITHOUT HAVING SPECIALLY PLEADED IT.

Where there is an allegation of an amount due, and a denial thereof, payment may be shown without having been specially pleaded as a defense: *Clark v. Wick*, 25 Or. 446, distinguished.

From Multnomah: JOHN B. CLELAND, Judge.

Suit originally between Louise Robertson and Geo. F. Robertson, in the course of which the Blake-McFall Co. was cited as garnishee. Judgment was entered against the garnishee from which it appeals.

REVERSED.

37	347
48	353

For appellant there was a brief and an oral argument by *Mr. John F. Logan*.

For respondent there was an oral argument by *Mr. Harry K. Sargent*, and a brief to this effect: The denial of indebtedness raises no issue: *Willis v. Holmes*, 28 Or. 265-268 (42 Pac. 989). Payment is new matter and cannot be proved under a general denial: *Clark v. Wick*, 25 Or. 446 (36 Pac. 165).

MR. JUSTICE WOLVERTON delivered the opinion.

This is a proceeding against a garnishee, wherein the appellant, the Blake-McFall Co., was cited to appear and answer certain allegations and interrogatories touching its indebtedness to the defendant, George F. Robertson. Among others, it is alleged "that the plaintiff is informed and believes that the said garnishee, at the time the said execution was levied as aforesaid, was indebted to the defendant, for work and service performed by the defendant at the request of said garnishee between the —day of—, 189—, and the date of said levy, in a large sum of money, the exact amount of which is unknown to this plaintiff, but sufficient to satisfy said decree." By stipulation of the parties this allegation was considered specifically denied, and upon the issue thus formulated they went to trial. The bookkeeper of the company was called in behalf of the plaintiff, and testified, in substance, that he knew the defendant, George F. Robertson, and that he was and had been in the employ of the company for eight years immediately prior thereto, at a salary of \$100 per month. Upon cross-examination the company attempted to show that it was not indebted to defendant, Robertson, on May 17, 1898, the date of the levy of the execution, in any sum, and that he had then received all sums of money earned by him while

in its employ; but upon objection to its introduction the proof was rejected by the court. Thereafter the company made the bookkeeper its own witness, and sought to prove the same matter, with a like result. The action of the court in these particulars has been assigned as error, and gives rise to the only question which it is necessary to consider at this time.

It is urged by counsel for respondent that the testimony was not admissible under the pleadings, because it tended to prove payment,—a fact the company had neither alleged nor set up in its answer to said allegations,—and that such fact was matter of defense, which should be affirmatively alleged before it could be proved. The question was presented as one of pleading purely, and we will so treat it. Generally speaking, payment cannot be shown in defense of an action under the traverse alone, but must be specifically alleged as matter in avoidance, in order to be available: *Benicia Agl. Works v. Creighton*, 21 Or. 495 (28 Pac. 775, 30 Pac. 676); *Clark v. Wick*, 25 Or. 446 (36 Pac. 165); *McKyring v. Bull*, 16 N. Y. 297 (69 Am. Dec. 696). There seems, however, to be a well-settled exception to this rule. Where an allegation, not stated as a conclusion of law, is so framed that an issue is presented by the traverse upon the fact of the amount due, proof of payment is admissible without an affirmative plea in the nature of a further defense. Thus, in *Quin v. Lloyd*, 41 N. Y. 349, the complaint stated the amount of defendant's indebtedness to plaintiff for services performed, without showing the value or extent thereof, which was followed by an allegation to the effect that the defendant, on a day named, became indebted to plaintiff in the sum of \$333.07, being the balance remaining due after sundry payments by the defendant to the plaintiff; and it was held, under a denial of the allegations, that the defendant was entitled to prove payment to the

plaintiff on account of the alleged services. So, in *Marley v. Smith*, 4 Kan. 155, it was alleged that at the commencement of the action the defendant was indebted to the plaintiff in the sum of \$75 on an account, a copy of which was annexed, and that the same was still due; and it was held that, while proof of a set-off or counterclaim was not admissible, yet that proof of payment was, and this upon the ground that the petition merely declared the amount of defendant's indebtedness to plaintiff, without stating the facts constituting the liability. To the same effect, see *Pomeroy*, Code Rem. (3 ed.) §§ 699, 700; *Knapp v. Roche*, 94 N. Y. 329. The allegation which we are considering imports nothing more than that the company on the date of the levy of the execution was indebted to the defendant, Robertson, for services rendered, in a sum sufficient to satisfy the plaintiff's decree. There are no facts alleged or shown whereby the circumstance of such indebtedness could be deduced as a conclusion of law. Hence, the amount of the indebtedness being the only fact alleged by which it may be said to exist, it was traversable; and, being traversed, it was proper to show payment under the issue thus formulated, to refute the fact of its existence. In this view of the law, the lower court was in error in rejecting the testimony offered. Its judgment will therefore be reversed, and the cause remanded for such further proceedings as may seem proper.

REVERSED.

Decided 11 June; rehearing denied 18 August, 1900.

PIERCE v. ROCK CREEK MINING COMPANY.

[61 Pac. 348.]

JUSTICE'S COURTS—SERVING SUMMONS IN ANOTHER COUNTY.

A summons issuing out of a justice's court must be served on the defendant within the county where the court sits: *Taylor v. Jenkins*, 11 Or. 274, and *Kirk v. Matlock*, 12 Or. 319, followed.

From Baker: ROBERT EAKIN, Judge.

Writ of review by Charles M. Pierce against the Rock Creek Gold Mining Co. and another to vacate a judgment of a justice of the peace. From a judgment in favor of plaintiff, defendants appeal. **AFFIRMED.**

For appellant there was a brief over the names of *Will R. King* and *F. M. Saxton*, with an oral argument by *Mr. Saxton*.

For respondent there was a brief and an oral argument by *Messrs. Chas. A. Johns, Frank L. Moore, and A. D. Stillman*.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

This is a proceeding by writ of review prosecuted for the purpose of reviewing the judgment of the Justice's Court for District No. 1, Baker County, Oregon, in a cause instituted therein June 7, 1898, wherein the Rock Creek Gold Mining Co. was plaintiff, and said Pierce was defendant, to determine the right of possession to a certain quartz mine, for which the plaintiff herein was seeking to obtain a patent from the general government. The plaintiff had filed or made the necessary application to the proper officer of the land office at La Grande, Oregon, for a patent, and the defendant mining company, having filed an adverse claim, instituted the action for the purpose of determining the right of possession, as required by the Revised Statutes of the United States (sections 2325, 2326). The summons was served in Union County upon Pierce, who appeared specially, and moved the court to quash and set aside the service because it was made in a county other than that in which the court was held. The motion was overruled, and, after some other proceedings not material to the question involved here, judgment was given by default in favor of the mining com-

pany for possession of the claim, which judgment having been annulled by the circuit court upon the review, the defendants herein appeal.

The solution of the question first raised upon the record, as to whether a justice's court acquires jurisdiction in a possessory action for a mining claim by service of the summons in a county other than that in which the court is held, is decisive of the controversy. The matter is governed wholly by statute, wherein we find no authority for the service. By Section 2175 of Chapter XIII of the Civil and Criminal Procedure in Justices' Courts, such courts are accorded jurisdiction of actions to recover the possession of mining claims situate within the county where the court is holden, but the provisions governing the acquirement of jurisdiction are the same as obtain in respect to other civil causes instituted therein. These are found in Sections 910 and 2061 of Hill's Ann. Laws, the latter section being part of the Justice's Code. They provide that, "in an action to recover a penalty or forfeiture given by statute, the cause of action or some part thereof must have arisen within the county where the action is commenced, or upon a lake, river, or other water bordering upon such county and opposite thereto; but otherwise than this the jurisdiction of a justice's court does not depend upon where the cause arose, provided that the plaintiff or defendant shall reside in the precinct where the action is commenced, or personal service can be had on the defendant in any precinct in the county; and if the defendant do not reside in the state, the action may be commenced in any precinct in the state;" and, further, that "the summons must be served at least five days before the time therein required for the defendant to appear, and may be served by the sheriff of the county or his deputy, or by any constable of the precinct, or marshal of the town or city in which the court is holden."

In speaking of section 910, Mr. Justice LORD has this to say (in *Kirk v. Matlock*, 12 Or. 319, 321, 7 Pac. 322, 324): "The jurisdiction of a justice's court does not depend upon where the cause arose, provided that the plaintiff or defendant shall reside in the precinct where the action is commenced, or personal service can be had on the defendant in any precinct in the county; and, if the defendant do not reside in the state, the action may be commenced in any precinct in the state." In *Taylor v. Jenkins*, 11 Or. 274, 276 (3 Pac. 681, 682), the court says: "Jurisdiction exists where either party resides in the precinct where the action is commenced, or the defendant is a nonresident, or where personal service of the summons is obtained in any precinct in the county." In this latter case the action was commenced in a given precinct, and the return showed personal service within the county, and the court interpreted the statute to mean that it is sufficient to confer jurisdiction if service can be had in the county where the action is commenced, regardless of the place of residence of either party.

There is yet another phase of the statute which contemplates that the action may be commenced in the precinct where the plaintiff resides, but in such case we find no authority for the service of the summons outside of the county. Such authority must be found in the statute, as the manner of acquiring jurisdiction of the person by a court whose jurisdiction is limited and inferior is purely statutory. Section 910 provides for no other than service in the county, nor is the authority enlarged by section 2061. By the latter section the summons may be served by the sheriff of the county (or his deputy) in which the court is holden. Now, it is well settled that a sheriff cannot serve civil process in his official capacity outside of his own county: *Crocker, Sher.* (3 ed.) § 348. So, it is quite natural to conclude that by legislative in-

tendment it was not designed that service should be made outside of the county.

But it has been suggested that the word "may" is not mandatory, and is therefor not inhibitive of the sheriff of any other county making service. The answer to this, however, is that the statute has not authorized or empowered any other sheriff to make it. This idea is reinforced by the fact that by section 2061 the summons is required to be served at least five days before the time therein required for the defendant to appear, and no other or different provision is made for his appearance in case the service is made outside of the county, as is the case where the action is commenced in the circuit court. The action in the justice's court is possessory in its nature, and was therefore properly brought in the county where the mining claim is situated, and in this respect is analogous to the case we have just been considering, where an ordinary action is commenced in the precinct where the plaintiff resides. The authority of the sheriff of the county to make the service is the same in both cases. Indeed, the nature of the action contemplates that there is some one in possession of the mine to be made defendant, who should necessarily be served in the county where the action is instituted. The sheriff of Union County being without authority to serve the summons upon the defendant in the cause pending in the justice's court in Baker County, the court did not acquire jurisdiction of the person of Pierce by such service, and therefore the judgment rendered against him was a nullity. The judgment of the circuit court annulling it will therefore be affirmed.

AFFIRMED.

Decided 18 June, 1900.

HUTCHINSON v. GORHAM.

[61 Pac. 431.]

87	847
89	412
37	347
45	278

JUDGMENT LIEN—TRANSCRIPT TO ANOTHER COUNTY.

Hill's Ann. Laws, § 572, requires the judgment docket to show when judgments were docketed. Section 269 enacts that the plaintiff may file a certified transcript of the original docket in the county clerk's office of any county of the state, and that the clerk of the latter county shall docket it in the judgment docket of his office, and it shall be a lien on the real property of the defendant in the county. The docket entry of the county where a judgment was rendered failed to show when the entry was made. An abstract of the docket entry of the judgment certified to the clerk of another county did not state, nor was it reasonably inferable therefrom, that the judgment was docketed in the county where the judgment was rendered, nor did the clerk's certificate state that the abstract was a transcript of the original docket, as required by section 269. The judgment came within the provisions of sections 263 and 264, requiring its entry in the journal within the day rendered, unless otherwise ordered by the court, and section 269, requiring the clerk immediately thereafter to docket it in the judgment docket. *Held*, that the docketing of such transcript in the latter county did not create a lien on the judgment defendant's real estate in that county, since subsequent purchasers of such real estate were not charged with constructive notice of more than could be discovered by an inspection of the transcript; the facts therein recited not being sufficient to create a lien in the latter county, both because the original docket does not show the date when the judgment was docketed, and because the copy does not purport to be a transcript of the original judgment docket.

From Union: ROBERT EAKIN, Judge.

Suit by Jas. H. and W. R. Hutchinson against Gorham & Rothchild and the Sheriff of Union County to enjoin the sale of certain real property on execution. The facts are that on June 13, 1888, one W. W. Ellis was the owner in fee of one hundred and sixty acres of land in Union County, Oregon, on which day judgment by default was rendered against him for the sum of \$2,079.12 in the Circuit Court of the State of Oregon for Baker County, in an action wherein the defendants H. O. Gorham and Herman Rothchild, as partners under the firm name of Gorham & Rothchild, were plaintiffs; that on September 7, 1888, said defendants, as plaintiffs therein, caused to be filed in the office of the County Clerk of Union County a memorandum, purporting to be a tran-

script of said judgment, whereupon said clerk made an entry in the judgment docket of said county at page 2 of volume B, under the index letter E, as follows :

JUDGMENT DOCKET, CIRCUIT COURT, UNION COUNTY, OREGON.

<i>Judgment debtor.</i>	<i>Judgment creditor.</i>	<i>Court.</i>	<i>Date of judgment.</i>	<i>Date of docket.</i>		<i>Damages.</i>
W. W. Ellis.	Gorham & Rothchild.	Transcript Cir. Ct. Baker Co.	1888, June 18.	1888, Sept. 7.	10%	\$ 2,079 12

—that in December, 1888, the plaintiffs herein loaned to Ellis the sum of \$1,100, to secure the payment of which he executed a mortgage on said real property, and on February 6, 1896, deeded the same to them in payment of the mortgage debt, which then amounted to \$1,825; that on April 20, 1899, an execution was issued on said judgment, directed to the Sheriff of Union County, who in pursuance thereof levied on said real property and advertised it for sale, to prevent which this suit was instituted, plaintiffs alleging that they were the owners in fee of said land, which they purchased without knowledge or notice of said judgment, and that a sale of the premises on said execution would create a cloud on their title. The answer having put in issue the allegations of the complaint, a trial was had, resulting in a decree as prayed for, and the defendants appeal. **AFFIRMED.**

For appellants there was a brief and an oral argument by *Messrs. John B. Messick and Wm. H. Packwood, Jr.*

For respondent there was a brief and an oral argument by *Mr. Thos. H. Crawford.*

MR. JUSTICE MOORE, after stating the facts, delivered the opinion of the court.

The question presented by this appeal is whether the entry in the judgment docket of Union County afforded plaintiffs constructive notice of the judgment rendered against their grantor in Baker County, Oregon. The following statutory provisions are deemed essential to a clear understanding of the question involved. Hill's Ann. Laws, § 569: "The records of the circuit courts are a register, journal, judgment docket, execution docket, fee book, jury book, and final record." Section 571: "The journal is a book wherein the clerk shall enter the proceedings of the court during term time, and such proceedings in vacation as this code specially directs." Section 572: "The judgment docket is the book wherein judgments and decrees are docketed, as elsewhere provided in this code. Each page thereof shall be divided into eight columns, and headed as follows: Judgment Debtors; Judgment Creditors; Amount of Judgment; Date of Entry in Journal; When Docketed; Appeal, When Taken; Decision on Appeal; Satisfaction, When Entered." Section 260: "All judgments shall be entered by the clerk in the journal, and shall specify clearly the amount to be recovered, the relief granted, or other determination of the action. * * * In the entry of all judgments, except judgments by default for want of an answer, the clerk shall be subject to the direction of the court." Section 263: "When judgment is given for want of an answer, the entry shall state substantially that the defendant has been duly served with the summons, and has failed to answer the complaint." Section 264: "When a decision has been made sustaining or overruling a demurrer, unless the party against whom the decision is made be allowed to amend or plead over, judgment shall be given

for the plaintiff or defendant, as the case may be, for such amount or relief, or to such effect, as it appears from the pleadings he is entitled to; but if the cause is otherwise at issue upon a question of fact, the court may order the entry of judgment to be delayed until such issue be tried or otherwise disposed of." Section 265: "When judgment is given in any of the cases mentioned in sections 263 and 264, unless otherwise ordered by the court, it shall be entered by the clerk within the day it is given." Section 269: "Immediately after the entry of judgment in any action, the clerk shall docket the same in the judgment docket. At any time thereafter, while an execution might issue upon such judgment, and the same remains unsatisfied in whole or in part, the plaintiff, or in case of his death his representative, may file a certified transcript of the original docket in the office of the county clerk of any county in this state. Upon the filing of such transcript, the clerk shall docket the same in the judgment docket of his office. From the date of docketing a judgment as in this title provided, or the transcript thereof, such judgment shall be a lien upon all the real property of the defendant within the county or counties where the same is docketed, or which he may afterwards acquire therein, during the time an execution may issue thereon." Section 270: "Whenever, after the entry of judgment, a period of ten years shall elapse without an execution being issued on such judgment, the lien thereof shall expire."

The entry in the judgment docket of Baker County is as follows, to wit:

No.	Judgment debtors.	Judgment creditors.	Judgment.		Time of entry.			Entered in judgment book.	
			Amount of judgment.	Interest.	Month.	Day.	Year.	No.	Page.
L118	W.W. Ellis.	Gorham & Rothchild.	\$ 2,079 12	10%	June.	13	1888	1	44

Under the title "Remarks," in the last column at the right, appears the following: "This judgment satisfied in the amount of \$1,000. See execution docket 'C,' p. 124." This docket contains other columns, but, no entries having been made therein respecting the judgment under consideration, they are omitted.

An inspection of this abstract of the judgment will disclose that no entry of "When Docketed" was made, as required by the provisions of Section 572, Hill's Ann. Laws. The lien of a judgment attaches to the real property of the judgment debtor, situate in the county in which the judgment is given, from the date of docketing the judgment, and to his real property in other counties of the state upon filing a certified transcript of the original docket in the offices of the county clerks of the latter counties: Hill's Ann. Laws, § 269; *Creighton v. Leeds*, 9 Or. 215; *De Lashmutt v. Sellwood*, 10 Or. 319; *Lovelady v. Burgess*, 32 Or. 418 (52 Pac. 25). As a condition precedent to securing a lien on the real property of W. W. Ellis, in Union County, Oregon, the judgment rendered against him must have been docketed in the county in which it was given, but when this was done is not discoverable from an examination of the judgment docket of Baker County; nor can it be ascertained from an inspection of the certificate of the county clerk of said county, upon the faith of which the County Clerk of Union County entered a memorandum of said judgment in the judgment docket of the latter county. The abstract certified to and filed in the office of the County Clerk of Union County is as follows:

Judgment debtor.	Judgment creditor.	Judgment.	Interest.	Date.	Book and page.
W. W. Ellis.	Gorham & Rothchild.	\$ 2,079 12	10%	1888, June 18	Journal I. p. 44

STATE OF OREGON, }
County of Baker. } 88.

I, E. H. Mix, county clerk of the above-named county and state, do hereby certify that the foregoing judgment has been by me compared with the original, and that the same is a correct transcript therefrom, and of the whole of such original judgment as same appears at page 48, volume I, record of circuit court proceedings for Baker County, Oregon, in my office, and in my care and custody.

In testimony whereof, I have hereunto set my hand and affixed my official seal this fifth day of September, A. D. 1888.

E. H. MIX,
County Clerk.

By WM. J. EASTABROOK,
Deputy.

[CIRCUIT COURT SEAL.]

This memorandum having been entered in the judgment docket of Union County prior to the execution of the mortgage given by Ellis to plaintiffs, they are chargeable with such notice as the judgment docket of Union County and the transcript from Baker County afforded.

In *Metz v. State Bank*, 7 Neb. 165, Mr. Justice MAXWELL, in speaking of the nature of a judgment docket, observes: "It is said that the docket is an index to the judgment, invented by the courts for their own ease, and the security of purchasers, to avoid the trouble and inconvenience of turning over the rolls at large." Further in the opinion, in commenting upon the duty of a purchaser of real property to examine such docket, he says: "A subsequent purchaser, however, is affected with such notice as the index entries afford; and, if they are of such a character as would induce a cautious and prudent man to make an examination, he must make such investigation, or the failure to do so will be at his peril." The rule is general that constructive notice without search is equivalent

to actual notice upon search: *Hesse v. Mann*, 40 Wis. 560. The statute creating the lien of a judgment, being remedial in its character, causes the lien to attach to the judgment debtor's real property, as against subsequent purchasers and incumbrancers thereof without notice, when the provisions of the act conferring the right have been substantially complied with: 2 Freeman, Judgm. § 343; 12 Am. & Eng. Enc. Law (1 ed.), 105. "The object of the law," says Mr. Justice FIELD, in *Re Boyd*, 4 Sawy. 262, Fed. Cas. No. 1,746, in construing section 269, Hill's Ann. Laws, "is to make the judgment a lien upon the property of the debtor in any county where it is situated; and, as such county may be at great distance from the one in which the judgment is rendered, the law contemplates that the docket entry shall impart knowledge of all the facts which a purchaser of the property need ascertain." Under the rule thus announced, the entry of an abstract of the judgment in the judgment docket of Union County did not impose upon plaintiffs the duty to examine the judgment docket of Baker County to ascertain the existence or validity of such judgment, but they were chargeable with constructive notice of all the facts expressly recited in the judgment docket of Union County; and it was incumbent upon them, as prudent and cautious men, to make an examination of the transcript from Baker County, to see if it recited that the judgment was docketed in that county, or stated facts from which it could be reasonably inferred that it would operate as a lien upon real property that Ellis might acquire therein: *Johnson v. Hess*, 126 Ind. 298 (25 N. E. 445, 9 L. R. A. 471). The judgment docket of Union County does not state that the judgment rendered against Ellis was docketed in Baker County, nor is such fact reasonably inferable therefrom. An examination of the

transcript from Baker County does not disclose that the judgment was ever docketed in that county, and the certificate appended thereto does not state that the abstract of the judgment, of which it forms a part, is a transcript of the original docket, as required by Section 269, Hill's Ann. Laws.

It is contended by defendants' counsel, however, that, the judgment having been rendered for want of an answer, the clerk was not subject to the direction of the court, but was required to enter the judgment in the journal within the day it was given, and immediately thereafter to docket the same in the judgment docket; that the complaint alleges, and it was stipulated at the trial, that the judgment was docketed in Baker County; and that, invoking the presumption that official duty has been regularly performed (Hill's Ann. Laws, § 776, subd. 15), it evidences the fact that the judgment was so docketed on the day in which it was given, and, this being so, the court erred in restraining the sale of the real property to prevent a cloud on plaintiffs' title. Whether the failure to state in the judgment docket of Baker County the date when the judgment was docketed renders it insufficient to create a lien on any real property Ellis might have in that county, is a question the determination of which is not necessary to a decision herein. Nor is it necessary to discuss the presumptions which might be invoked in that county in aid of the record. We do not think the presumption relied upon sufficient to charge the plaintiffs with constructive notice of more than could be discovered by an inspection of the transcript filed in Union County, and, no facts having been recited therein from which it could be inferred that the judgment was sufficient to create such lien in Baker County, it follows that the decree is affirmed.

AFFIRMED.

Decided 2 July, 1900.

CHURCH v. ADAMS.

[61 Pac. 639.]

TIMBER CULTURE CLAIM—VALIDITY OF CONTRACT TO SELL.

20 U. S. Stat. 113, § 2, governing timber culture claims, and providing that a person applying for the benefit of the act shall make affidavit that the entry is for the cultivation of timber for his exclusive use, and on final proof shall show that he has planted a certain number of trees, and cultivated and protected them for a certain time, does not inhibit the claimant, who has made entry in good faith, from contracting before final proof to sell his claim.

From Malheur: MORTON D. CLIFFORD, Judge.

Suit by J. M. Church, administrator of the estate of R. M. Steel, deceased, to close a partnership of his intestate with I. H. Adams, and for an accounting. Plaintiff appeals from the decree entered. MODIFIED.

For appellant there was a brief and an oral argument by *Mr. Chas. H. Finn*.

For respondent there was a brief over the names of *James A. Fee*, *R. G. Wheeler*, and *Robert J. Slater*, with an oral argument by *Mr. Fee*.

MR. JUSTICE BEAN delivered the opinion.

This is an appeal from part of a decree in a suit brought by plaintiff's intestate to dissolve a partnership and for an accounting. The only question for the consideration of this court is whether two tracts of land, known and referred to in the record as the "Timber Culture Claim" and the "Weaver Place," belong to, and are part of, the partnership assets. On November 17, 1885, the plaintiff's intestate, R. M. Steel, and the defendant, Adams, entered into a partnership, to continue for ten years, under the firm name and style of Steel & Adams, for the purpose of carrying on the business of

37	856
42	271
442	275
37	355
445	77

farming and stock raising in Baker County. Under the terms of the partnership agreement, Steel was to, and did, advance to the partnership \$10,000, to remain invested in the business during its continuance, in consideration of which Adams agreed to furnish the labor and services of himself and family in the prosecution and management of the business. At the time of the formation of the partnership, Adams was the owner of a pre-emption claim consisting of one hundred and sixty acres, and a timber culture filing on another quarter section, one-quarter interest in the Nevada Ditch, and horses, cows, wagons and farming machinery. Immediately after the formation of the partnership, the firm purchased of Adams the property then owned by him for \$11,601, paying for it with the \$10,000 advanced by Steel and \$1,601 loaned by him to the company on its demand note. The partnership continued the business until the expiration of the time limited in the articles of copartnership, at which time, the parties being unable to settle their affairs, this suit was brought by Steel for a dissolution of the partnership and an accounting, pending which Steel died, and Church, having been appointed administrator of his estate, was substituted as plaintiff.

The questions presented are, first, whether Adams' timber culture claim is part of the assets of the partnership. At the time of its formation, there were present and participating in the negotiations, R. M. Steel, his son, George A. Steel, and the defendant, Adams, and upon the testimony of these three persons must the question be determined. R. M. Steel, in referring to the matter, says, in answer to interrogatory No. 16: "Two thousand dollars of the amount furnished by me to the firm of Steel & Adams, on November 18, 1885, which was paid to I. H. Adams immediately after coming into possession of the firm, was invested in land, that

sum being paid for the east half of the northeast quarter, and the east half of the southeast quarter, of section 24 ;" and in answer to interrogatory No. 17 : "Two hundred dollars was paid for the improvements on the west half of the southeast quarter, and the east half of the southwest quarter, of same section, this sum being for improvements consisting of fifteen acres of clearing and five hundred trees, the title to the land being then in the United States, the defendant having entered same under the timber culture act. All subsequent improvements were to be made at the expense of the firm, including fees for making final proof, and when patent issued defendant was to deed the land to the firm forthwith, without further consideration. * , * * Defendant had no means at the time articles of copartnership were entered into, except such property as he sold the firm, and all the moneys so received for said property were required and used to pay his indebtedness, I do not know of his having acquired any means in his own right since that time, as his time has been devoted to the care and management of the business of the firm without salary, the necessary wearing apparel for defendant and his family even having been purchased from firm assets and advanced to defendant, no part of which advances have been reimbursed to the firm. I believe defendant claims now to own said timber culture in his own right, notwithstanding the fact that all his rights to same were purchased by the firm immediately after its organization, and that it always has been considered to be firm property. The subsequent improvements on the land were all made by the firm, and cost probably \$2,000 or \$3,000.

George A. Steel, the confidential clerk and accountant of his father, took part in the negotiations leading to the formation of the partnership, and has since been more or less familiar with its business. He says, in answer to

interrogatory No. 16: "From the sum of \$10,000, invested by the plaintiff in accordance with the articles of copartnership, November 18, 1885, and the sum of \$1,601, loaned by the plaintiff to the partnership on that date, which were invested at the same time, the sum of \$2,000 was invested in the east half of the northeast quarter and the east half of the southeast quarter of section 24;" and, in answer to interrogatory No. 17, says: "Seventy-five dollars was advanced and paid to defendant for clearing the fifteen acres, and \$125 was paid the defendant for trees set out and growing on the west half of the southeast quarter and the west half of the southwest quarter of said section 24, which land belonged at that time to the government, and which the defendant had entered under the timber culture act. It was agreed between the defendant and plaintiff that in consideration of the formation of the partnership and the purchase of property from the defendant, as contemplated thereby, and the payment of the sum of \$200 above mentioned, together with the making of all subsequent improvements necessary to enable the defendant to make final proof upon said land, the defendant was to deed the said land to the firm so soon as he received the patent therefor. At the time of the formation of the partnership, and upon facts furnished from statements made to me by the defendant, I made up a schedule of all property owned or controlled by him at that time after he should have repurchased from the Oregon Construction Co. certain freight teams, fully equipped, which he had theretofore sold them, which said schedule, marked 'Exhibit D,' is attached to the deposition of R. M. Steel in this case. The total amount of property, according to the valuation placed thereon by the defendant, amounted to the sum of \$12,011. This valuation was afterwards reduced by agreement between plaintiff and defendant by the sum of \$410, leaving the

balance of the property, as agreed upon between plaintiff and defendant, \$11,601, which sum was afterwards paid defendant by the firm for such property. * * * I know of no means acquired by the defendant in his own right since the formation of the partnership. The west half of the southeast quarter and the east half of the southwest quarter of said section 24, known as the 'Timber Claim,' has always been held, used, and considered to be property belonging to the firm, and improvements thereon, which have been very extensive, have been made by the firm in such a manner as would not have been pursued with property not belonging to them. The cost of such improvements, considering the clearing, preparing for irrigation, by means of construction of wheels, pumps, windmills, water wheels, flumes, ditches, setting out and growing of fruit trees, and water therefor, would, in my judgment, amount to several thousand dollars. No detailed account of the expenditures in the way of labor on the above-described land was ever reported or kept, nor were the other expenditures charged up to defendant's account, as would have been the case if it had been considered to be his individual property. Upon the books of the firm the total investment in real estate is shown to be \$400, the remaining \$1,800 of the total \$2,200 allowed defendant for the east half of the northeast quarter, the east half of the southeast quarter, the west half of the southeast quarter, and the west half of the southwest quarter of said section 24, being represented by note of the defendant to the firm, dated November 18, 1885, due June 30, 1891, without interest; it being calculated that the defendant would have made final proof by this date upon the timber culture, and he was then to deliver forthwith the deed of said land to the firm, without further consideration than the surrendering of the note in question. A memorandum was made by me at the time of

the agreement between plaintiff and defendant, reading as follows: 'The attached note is to be canceled at maturity by deed to timber claim, all improvements on which are to be done by Steel & Adams, without charge to I. H. Adams, consideration for one hundred and sixty acres to be \$1,800.' And this agreement has at all times since remained attached to the note, and said note and agreement attached is appended to the deposition of R. M. Steel in this case, and marked 'Exhibits E and F.' "

As explaining why Adams' note for \$1,800 was taken by the firm, to be delivered and surrendered up when the timber culture claim should be deeded to it, and in explanation of the entry in the books in reference thereto, the witness says, in answer to cross interrogatories 12 and 14: "The memorandum of Adams' property, and the value thereof, made as a basis for the formation of the partnership, was used to form the basis of the entries on the books, and these prices are correct as agreed upon, with the exception of the valuation of the real estate and improvements on the timber culture, which are erroneous as they appear on the books and as testified by me in answer to interrogatory No. 17 of the direct examination; the amount charged to bills receivable for I. H. Adams' note, dated November 18, 1885, \$1,800, being in fact chargeable to real estate. The reason of this entry being made in this manner was that the defendant had not made final proof on the timber culture claim, and it was feared that the knowledge of the actual transaction between defendant and the firm of Steel & Adams, if entry was correctly made, might prevent the making of such final proof. * * * The amount agreed upon which I. H. Adams was to receive for the one hundred and sixty acres of land owned by him in November, 1885, and his interest in the timber culture claim and improvements thereon, all subsequent improvements necessary to enable him to

make final proof, and all future expenses in connection therewith, to be made and paid for by the firm, who would then be entitled, upon the issuing of the patent, forthwith to the deed from I. H. Adams of the timber culture, was \$2,200; but, owing to the fact that I. H. Adams had not made final proof of the timber culture claim, and for the reason stated in answer to interrogatory No. 12, the price paid for the one hundred and sixty acres of land is entered at \$400, and no mention is made of the timber culture, while the difference of \$1,800 between the amount of \$400 mentioned and the valuation of \$2,200 agreed upon for the one hundred and sixty acres of land and timber culture was charged to bills receivable, for I. H. Adams' note, dated November 18, 1885, for that amount, which said note was made to fall due in 1891, at a time when it was calculated that Mr. Adams would have made final proof upon the timber culture claim, and which he was then forthwith, and without consideration, except the surrender of the \$1,800 note, to deed to the firm of Steel & Adams." Upon the schedule of Adams' property which the witness George A. Steel says he made up at the time of the formation of the partnership and its purchase of the property, and which was identified and introduced in evidence, and marked "Exhibit D," appears an item of \$75 for clearing fifteen acres of the timber claim, and \$125 for trees planted thereon, which tends to corroborate the testimony of both R. M. and George A. Steel as to the terms of the partnership agreement and the property purchased by it from Adams.

The testimony of the Steels in reference to this matter is contradicted by Adams, who testifies that he was to deed the pre-emption claim to the partnership for \$2,000, but nothing was said about purchasing the timber claim, or paying for the trees or clearing thereon, although both places were to be improved and worked together; that

he never kept any account of the cost of the improvement made on the timber culture claim, but thinks it amounted to \$3,000 or \$4,000; nor did he keep any account of the income therefrom, but it was treated as the property of the firm. The witness seems to rely principally upon his recollection of what occurred at the time of the formation of the partnership, and he is contradicted by R. M. and George A. Steel, whose testimony is corroborated by written memoranda made at the time. It is true the defendant offered in evidence what purports to be a list of his property at the time the partnership was entered into, which he insists is the schedule upon which the purchase was made. It corresponds substantially in all particulars with Exhibit D, except that the items for clearing a portion of the timber claim, and for five hundred trees thereon, amounting in the aggregate to \$200, are omitted from defendant's list, and instead thereof is an item of \$200 for the potato crop thereon. The testimony of the defendant shows that this list, marked "Exhibit 9," was discovered among his papers after the commencement of this suit, and is in the handwriting of George A. Steel. George A. Steel testifies that in his opinion it was made out, together with other statements, for the convenience of Mr. Adams, some time subsequent to, or perhaps prior to, the formation of the partnership, but that it was not considered when the partnership was formed, nor did it form the basis thereof. The witness says that during the negotiations looking to the formation of the partnership several lists of property owned by Adams, with differing valuations, were made out, but he testifies that the list which formed the basis of the partnership is the one made out by him, introduced in evidence by the plaintiff, and marked "Exhibit D," which contains the items of clearing the tree claim and the five hundred trees; and, when the defendant's

particular attention was called to Exhibit D, and he was asked if he was willing to swear that he did not see it at the time the partnership was formed, he said: "Well, I saw something of this kind, but I would not swear it was this one. This one seems to be made in pencil, and I don't remember whether that was in writing or not, or in pencil. There is no date to this. It was done ten years ago. Q. Are you willing to swear, Mr. Adams, that that wasn't made at your dictation at that time? A. I probably dictated the instrument that was made at that time, but I wouldn't swear to this one. No, sir; there is no signature to it that I could prove anything or that could be identified positively." So that, upon the whole, we are of the opinion that the manifest weight of the testimony is in favor of the plaintiff's contention that it was understood and agreed at the time the partnership was formed that the timber culture claim should belong to and become a part of the assets of the firm, and be conveyed to it as soon as Adams should make final proof, and acquire title from the government.

It is argued, however, that such a contract is void as against public policy. In support of this position, reliance is had upon a line of authorities holding that the courts will not enforce specific performance of a contract made by a homesteader to convey his claim after final proof: *Clark v. Bayley*, 5 Or. 343; *Brake v. Ballou*, 19 Kan. 397; *Warren v. Van Brunt*, 86 U. S. (19 Wall.) 646; *Brewster v. Madden*, 15 Kan. 249; *Oaks v. Heaton*, 44 Iowa, 116; *Anderson v. Carkins*, 135 U. S. 483 (10 Sup. Ct. 905). The homestead law requires the applicant to make an affidavit at the time of his entry that it "is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person" (Rev. Stat. U. S. § 2290); and, on making his final proof, "that no part of such

land has been alienated, except as provided in section 2288" (Rev. Stat. U. S. § 2291), viz., "for church, cemetery, or school purposes, or for the right of way of railroads." Under this provision of the federal statute, it is held that, as a homestead claimant who has sold or contracted to sell his homestead, or a part thereof, cannot make final proof without perjuring himself, a contract to do so is against public policy, and will not be enforced in a court of equity. But we are not directed to any such provision in the law governing timber culture claims, nor to any provision therein against alienation. It provides (20 Stat. 113, § 2) that a person applying for the benefit of the act shall make affidavit at the time of his entry "that this filing and entry is made for the cultivation of timber, and for my own exclusive use and benefit; that I have made the said application in good faith, and not for the purpose of speculation, or directly or indirectly for the use or benefit of any other person or persons whomsoever; that I intend to hold and cultivate the land, and to fully comply with the provisions of this said act." And the only provision in reference to final proof is that "the person making such entry, or, if he or she be dead, his or her heirs or legal representatives, shall prove by two credible witnesses that he or she or they have planted, and, for not less than eight years, have cultivated and protected such quantity and character of trees as aforesaid; that not less than twenty-seven hundred trees were planted on each acre, and that at the time of making such proof that there shall be then growing at least six hundred and seventy-five living and thrifty trees to each acre." We do not understand this provision to inhibit the timber culture claimant who has made his entry in good faith from contracting to sell his claim prior to the final proof, and the law seems to be so interpreted by the land de-

partment of the United States: *Sims v. Busse*, 4 Land Dec. Dep. Int. 369; *United States v. Read*, 5 Land Dec. Dep. Int. 313.

So far as the Weaver place is concerned, the evidence shows that it was deeded to the defendant's wife by Weaver some time after the formation of the partnership of Steel & Adams, and there is no testimony, except mere inferences, on behalf of the plaintiff, that it was purchased or paid for with the partnership funds. On the other hand, the defendant, his wife, and their son all testify that it was purchased and paid for by Mrs. Adams with her own money, and this evidence is substantially uncontradicted. Moreover, Mrs. Adams is not a party to this suit, and therefore no decree could be made, in any event, which would be binding upon her. The decree of the court below will be modified in accordance with these views.

MODIFIED.

Decided 2 July, 1900.

SUSEWIND v. LEVER.

[61 Pac. 644.]

MEMORANDUM AS EVIDENCE.*

To render a memorandum admissible in evidence it must appear that the person who made it knew when he made it that it was true, and that he is now unable to state the facts except by using the statements therein contained: *Friendly v. Lee*, 20 Or. 202, cited.

From Union: ROBERT EAKIN, Judge.

Action by H. E. Susewind against W. S. Lever and the Union Woolen Mill Co., as garnishee. From a judgment against the garnishee it appeals.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. Thos. H. Crawford*.

*NOTE.—This subject is also very fully discussed in the case of *State v. Magers* 35 Or. 520, and 36 Or. 38.—REPORTER.

For respondent there was a brief over the names of *Leroy Lomax* and *F. S. Ivanhoe*, with an oral argument by *Mr. Lomax*.

MR. JUSTICE MOORE delivered the opinion of the court.

This action was commenced in the circuit court for Union County to recover of W. S. Lever the sum of \$410.50, and, a writ of attachment having been issued therein, a certified copy thereof and a notice of garnishment were served upon the Union Woolen Mill Co., a corporation, and, its certificate in response to such notice being unsatisfactory to the plaintiff, he served upon it written allegations and interrogatories respecting a debt alleged to be due on account of labor performed by the defendant for it, and, such averments and questions having been answered in writing under oath by the president of said corporation, issue was joined thereon, and, a trial being had, judgment was rendered against the garnishee for the sum of \$175, and it appeals.

It is contended by appellant's counsel that the court erred in admitting in evidence, over their objection and exception, what purported to be a memorandum containing a statement of the time the defendant was employed by the Union Woolen Mill Co., the compensation he was to receive therefor, and the amount due on account thereof. J. F. Lever, a witness for plaintiff, testified that as superintendent of the Union Woolen Mill Co. he kept the time of all persons in its employ; that he secured a correct statement of the time defendant worked for said corporation; that he prepared a memorandum of such time, which, upon its being exhibited to him, he recognized as his handwriting, whereupon said memorandum was offered in evidence, and is as follows :

"UNION WOOLEN MILL Co., Dr.,

"To W. S. LEVER, for labor.

July, 1897, work on factory roof, 14 days, \$1.75.....	\$	24 50
August, 1897, work on factory setting up machinery, 26 days at \$3.00.....		78 00
Sept., 1897, work at factory, 26 days, \$3.00.....		78 00
Oct., 1897, work at factory, 26 days, \$3.00.....		78 00
Nov., 1897, work at factory, 26 days, \$3.00.....		75 00
Dec., 1897, work at factory, 26 days, \$3.00.....		78 00
Jan., 1898, work at factory, 19 days, \$3.00.....		57 00
Feb., 1898, work at factory, 24 days, \$3.00.....		72 00
March, 1898, work at factory, 15 days, \$3.00.....		45 00
April, 1898, work at factory, 26 days, \$3.00.....		78 00
May, 1898, work at factory, 26 days, \$3.00.....		78 00

\$ 741 50"

Private writings adverse to the interest of the person making them are admissible as evidence of the facts stated therein when such person is dead or without the state: Hill's Ann. Laws, § 767. If it be admitted that the memorandum objected to was against the interest of J. F. Lever, who made it as agent of the garnishee, he was present at the trial, and by inspecting the writing, if his memory was refreshed thereby, he could have testified as to its contents, thus superseding the necessity of offering it in evidence. A witness is allowed to refresh his memory respecting a fact by anything written by himself, or under his direction, at the time when the fact occurred or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew the same was correctly stated in the writing: Hill's Ann. Laws, § 836. The memorandum, however, is not admissible in evidence, except when the memory of the person who wrote it, or caused it to be made, is not refreshed by its inspection, and as a witness he testifies that he knew the writing was correct when made, but that he is unable to detail the particulars from recollection: Wood, Prac. Ev. § 134; Thompson, Trials, § 402, subd. 4, and notes. It is the duty of a party to introduce the best evidence that is within his power to produce, and if he call a witness who, after examining a memorandum made by him or under his direction, re-

members the facts therein stated, the knowledge of the witness in this respect is superior to the memorandum, and better subserves the purpose of a trial, because it affords an opportunity of cross-examination, thereby rendering the writing inadmissible: *Friendly v. Lee*, 20 Or. 202 (25 Pac. 396); *Paine v. Sherwood*, 19 Minn. 315 (Gil. 270); *Field v. Thompson*, 119 Mass. 151; *Commonwealth v. Ford*, 130 Mass. 64 (39 Am. Rep. 426); *Commonwealth v. Jeffs*, 132 Mass. 5. Where, however, the memory of the witness is not refreshed by an examination of the writing he has made, so as to enable him to state the particulars from recollection, and he testifies that he knew when the memorandum was made that it correctly stated the facts, it then becomes admissible, because it is the best evidence procurable under the circumstances. "A great variety of American cases," says Mr. Justice COWEN, in *Merrill v. Ithica & O. R. R. Co.* 16 Wend. 586 (30 Am. Dec. 130), "have arisen where the witness, having made the entry or memorandum, could swear to his belief of its truth, but had entirely forgotten the facts which he recorded, in which the paper thus attested has been received and read in evidence to the jury." Further in the opinion, after citing several cases which support the legal principle thus announced, the distinguished jurist concludes by saying: "The result is that original entries, attested by the man who makes them, may be read to the jury, though he remembered nothing of the facts which they record." See, also, *Spann v. Baltzell*, 1 Fla. 301, 338 (46 Am. Dec. 346); *Bank of Monroe v. Culver*, 2 Hill, 531; *Bank of Tennessee v. Cowan*, 7 Humph. 70; *Sasscer v. Farmer's Bank*, 4 Md. 409; *Haven v. Wendell*, 11 N. H. 112; *Watson v. Walker*, 23 N. H. 471; *Webster v. Clark*, 30 N. H. 245; *State v. Shinborn*, 46 N. H. 497 (88 Am. Dec. 224); *Sickles v. Mather*, 20 Wend. 72 (32 Am. Dec. 521). The transcript does not show that J.

F. Lever's memory was faulty respecting the statement which he prepared, or that he knew it was true when he made it. The proper foundation for the introduction of this memorandum not having been laid, it was error to admit it in evidence, and the judgment must therefore be reversed, and the cause remanded for a new trial.

REVERSED.

Decided 2 July, 1900, rehearing denied 17 September, 1900.

FANNING v. GILLILAND.

[61 Pac. 886, 67 Pac. 209.]

OPENING HIGHWAY—APPEAL—WRIT OF REVIEW.

1. An appeal from the award of damages in a proceeding for opening a public road does not preclude the right to review the regularity of the proceedings establishing such road: *Kirkwood v. Washington County*, 32 Or. 588, applied.

CONSTITUTIONAL LAW—EMINENT DOMAIN—HIGHWAYS.

2. Where a road sought to be laid over private property will be open, when laid, to all who may desire to use it, the laying of the road will not constitute a taking of private property for private use, forbidden by the constitution, though it may in fact accommodate but a single family: *Towns v. Klamath County*, 33 Or. 225, cited.

NECESSITY FOR HIGHWAY—LEGISLATIVE QUESTION.

3. The allegation in a petition for a public road over private property that it is necessary, and that the property of the petitioners cannot be reached by any convenient highway, is not issuable, since the manner of its determination is a legislative question, and since the legislature has provided that the appearance of these facts in the petition shall be sufficient to authorize the court to appoint viewers to lay out the road.

DAMAGES BY OPENING HIGHWAY—POLITICAL QUESTION.

4. The report of viewers appointed by the court to lay out a public road over private property that the road has been so laid as to cause the least damage is not issuable, since the question raised is political in its nature, and the procedure authorized by the legislature for its ascertainment makes provision for a hearing only on the ultimate question of compensation for the damage.

CONSTRUCTION OF REPORT OF VIEWERS.

5. Where viewers were appointed and directed to lay out a road according to the prayer of the petition therefor, and assess the damages, and they reported that they had laid out the road "upon the most practicable route, and in accordance with the petition, and so as to do the least possible damage to the land over which it passed," it sufficiently appears that the route adopted was the best one in their judgment.

TAKING PRIVATE PROPERTY—VALIDITY OF ORDER OPENING HIGHWAY.

6. An order of a county court confirming the report of viewers, declaring the road in question to be a public highway, and ordering it opened on payment of the costs and assessed damages, is not void, though at the time of entering it the damages and costs had not been paid, since by its terms there was no taking of property except on condition of the payment of damages.

37	369
40	78
40	79
37	369
43	538
37	369
44	62
44	252
37	369
46	243
46	548
37	369
48	288
48	618

From Umatilla : STEPHEN A. LOWELL, Judge.

This is a proceeding by writ of review by C. O. Fanning and others against J. M. Gilliland and another to test the legality of the establishment by the County Court of Umatilla County, Oregon, of a road of public easement across the lands of the plaintiffs. The sworn petition presented for the location and establishment of the road shows that F. B. Clopton, one of the petitioners, is the owner of forty acres of land situated in township 2 north, range 32 east of the Willamette Meridian ; that he has a dwelling house situated thereon, which is occupied by J. M. Gilliland, the other petitioner, under a lease ; that said dwelling is situate immediately south of the Umatilla River, which becomes so swollen in the winter and spring as to render it impassable ; that McKay Creek, which flows on the south and west of said dwelling, is also impassable during the same seasons, and there is no public highway across either of the streams, accessible to petitioners' residence ; that there has been a road from their residence to the City of Pendleton, but that about January 31, 1899, C. O. Fanning, upon whose land it was located, closed it up and refused to permit petitioners to use it ; that petitioners' residence is not reached by any convenient public road or otherwise ; that it is necessary that petitioners and the public have ingress and egress to and from such residence, and that by reason of the closing of said road all such means of ingress and egress have been cut off ; that a good road, convenient to petitioners' residence, can be laid out, constructed and established upon the line of the old road so closed, without doing unnecessary damage. The prayer of the petition is that a county road and public highway, thirty feet in width, be laid out and established, commencing at the gate in the dooryard fence of the petitioners' residence, and running thence

upon the line of the old road, as nearly as practicable, to a designated point, "at which commences county road No. 430," and that viewers be appointed to locate and establish the same, and to assess the damages, if any, accruing to the individuals over whose lands it passes. To this petition an answer was filed by the objectors, the plaintiffs herein, protesting that the court had no jurisdiction over the subject-matter, and putting in issue all the material allegations thereof, which, after argument and hearing, was stricken out upon motion of the petitioners. In pursuance of the petition the county court made an order reciting the facts therein stated as being shown under oath, and appointing viewers, with directions to meet at the beginning of the said proposed road on the twenty-second day of March, 1899, and lay out, locate and establish a thirty-foot road, in accordance with the petition, and to assess the damages sustained to the parties through whose premises it should be located, according to law, and to report their proceedings to the court at the May term following; and the court further directed that a copy of the order be served upon the persons affected. In due time the viewers made a report, to which objections were filed, with a prayer that the objectors be allowed to produce evidence to show that it was not just. These were stricken out, and, a motion subsequently filed to vacate the same being overruled, the court entered an order confirming the report and establishing the road; and a writ of review to the circuit court having been thereupon sued out by plaintiffs, and there dismissed, they appeal to this court. AFFIRMED.

For appellants there was a brief and an oral argument by *Messrs. J. H. Raley, John J. Balleray, and Thomas G. Hailey.*

For respondents there was a brief and an oral argument by *Messrs. Jas. A. Fee and Robert J. Slater*.

MR. CHIEF JUSTICE WOLVERTON, after stating the facts, delivered the opinion of the court.

1. The respondents moved to dismiss the appeal for the reason that the plaintiffs had appealed to the circuit court from the assessment of damages, it being contended that by prosecuting such appeal they have waived the right to prosecute their remedy by writ of review. In this contention we cannot concur, for two reasons: (1) It was not the purpose of the statute, in giving the appeal from the assessment of damages, to permit the regularity of the proceedings for the establishment of the road to be questioned therein; and (2) by Section 585, Hill's Ann. Laws, as amended by the act of 1889 (Sess. Laws 1889, pp. 134, 135), the writ of review is made concurrent with the right of appeal, so that an appeal from the assessment of damages does not waive the right to have the proceeding to lay out and establish the road reviewed at the same time. As bearing upon the question whether the remedies are concurrent, see *Hill v. State*, 23 Or. 446 (32 Pac. 160); *Kirkwood v. Washington County*, 32 Or. 568 (52 Pac. 568). The motion is therefore denied.

It is urged that it was error to strike out the answer to the petition for the location and establishment of the road, because it tendered issues upon matters of law and fact essential to be established before the prayer of the petition could be granted. Among them were (1) that the use for which it was proposed to appropriate the plaintiffs' lands was not a public use; (2) that the residence of the petitioners was at that time reached by a convenient public road; and (3) that the road proposed by the petition was not located so as to do the least dam-

age to the premises of the plaintiffs. It was sought to produce evidence upon all these questions, and to obtain a hearing upon them as questions of fact, and it is urged that the court was powerless to proceed without it, issues thereon having been tendered. The law has made no provision for any such hearing, although it requires notice to be given of the appointment of viewers to lay out the road, and assess the damages accruing by reason of its location and establishment. It cannot be doubted but that all these questions are matters for judicial determination. The first two must be adjudicated and determined before the viewers can be appointed, but the latter is to be resolved with their assistance, when authorized to act.

2. As it pertains to the first question or issue, the proposition is advanced that private property cannot be taken for private use, even with compensation, and therefore it must be first determined that the proposed taking is for a public use, before damages can be legitimately assessed; hence, that an adjudication of the fact that the use is public, without an opportunity of being heard, is the taking of property without due process of law, and inimical to the national constitution. This is a question which challenges the jurisdiction of the court; for, if it be true that a road of public easement such as is provided for by statute is not the taking of property necessary to its establishment for a public use, then the court is without authority to act, and the proceeding ought to stop whenever attention is called to it. This court has, however, decided that the taking of property for such a purpose is a taking for a public use. Mr. Justice BEAN, in *Towns v. Klamath County*, 33 Or. 225, 232 (53 Pac. 604), says: "The principle to be deduced from the adjudged cases bearing upon the question seems to be that if, by a fair construction and operation of the statute, the road,

when laid out, is in fact a public road, for the use of all who may desire to use it, the law is not liable to the charge of unconstitutionality, and is valid, though the road may be laid out on the application of, paid for and kept in repair by, the petitioner, and primarily designed for his benefit; but if such road is to become a mere private way, and not open to the public, the law sanctioning it is void. * * * Within this principle, the act in question is valid. The road provided for is an open, public way, thirty feet in width, which may be traveled by any person who desires to use it. The fact that it may accommodate but a limited portion of the public, or even but a single family, is no objection to the validity of the law providing for its location. The test is whether it is an open, public way, or one for the exclusive use and benefit of the petitioner."

We are aware that the question whether the use is in fact public is one for ultimate determination, under the constitution, by the judiciary; that while the legislature usually takes the initiative, and, in its adoption of laws looking to the purpose, necessarily passes upon their constitutionality, it is yet within the exclusive and peculiar functions of the courts to determine the question, whenever appropriately brought to their notice: *Bridal Veil Lumbering Co. v. Johnson*, 30 Or. 205 (60 Am. St. Rep. 818 46 Pac. 790, 34 L. R. A. 368); *Apex Transportation Co. v. Garbade*, 32 Or. 582 (52 Pac. 573, 54 Pac. 367, 882); *Chicago, etc. R. R. Co. v. Wiltse*, 116 Ill. 449 (6 N. E. 49); *Lewis*, Em. Dom. § 158; 10 Am. & Eng. Enc. Law (2 ed.), 1069b. The question being one of jurisdiction, it may be heard at any stage of the proceeding, as well in the circuit as in the county court; and, under the settled rulings of this court, it may be heard here for the first time. There is no issue of fact to be joined upon the question. The statute has prescribed what may be

done, and the matter of determination whether the appropriation of the lands necessary to the establishment of the road is for a public use is capable of being solved, under the statute, from the record. No facts that may be proven can present a different issue than such as the law itself has tendered, and the notice which is required to be given by a service of the order of appointment of the viewers gives ample opportunity for hearing upon this jurisdictional question, so that it cannot be said that the taking is without due process of law. In reality the county court passed upon the question when it entertained cognizance of the cause against the protests of the plaintiffs that it was without jurisdiction over the subject-matter.

3. The next question, viz., whether the residence of the petitioners could be reached by any public highway, and another closely allied to it, whether it is necessary that such persons and the public shall have ingress and egress to and from the residence of such persons, are political or legislative in their character, and the mode and manner of their ascertainment and determination are matters wholly within the authority of the legislature to devise: *Towns v. Klamath County*, 33 Or. 225 (53 Pac. 604); *Zimmerman v. Canfield*, 42 Ohio St. 463; *People v. Smith*, 21 N. Y. 595. The legislature having provided that, upon a sworn petition of the person whose residence is not reached by a convenient public road, the court may appoint viewers, the law has prescribed that this is sufficient to set the court in motion. These facts are not issuable, because not made so by statute, and are sufficient when appearing by the petition, because it fulfills or constitutes the mode of procedure pointed out by the law. As was said in *Towns v. Klamath County*, 33 Or. 225 (53 Pac. 604), touching the question of the exercise of eminent domain, "it is sufficient for the protection of his

constitutional rights if he has notice, and is given opportunity at some stage of the proceedings to be heard upon the question of compensation for his land so appropriated."

4. The third question, viz., whether the road proposed by the petition was located thereby so as to do the least damage to the premises over which it passes, is one to be ascertained by the viewers for the advisement of the court. This is not a preliminary question, as are the preceding ones, to be determined by the court, and essential to the exercise of the power and authority to proceed, but is an issue subsequent to the acquirement of jurisdiction, and constitutes but a method of procedure in laying the road. The procedure must be substantially followed in the establishment of the road; but the objectors thereto are not permitted to form an issue touching the fact of "least damage" to be tried in any other way than by the report of the viewers. This they try without issue being made upon the pleadings, and make report of their findings under the law. Like the last preceding questions, it is legislative in its character, and the procedure adopted for the ascertainment of the fact may be pursued without an opportunity for a hearing, where provision is made therefor, upon the ultimate question of damages as compensation for the taking. Nor do we think that the objectors were entitled to a hearing upon the justice of the viewers' report. That is a matter to be determined from the report itself, and it cannot be disputed by any method not prescribed by statute.

There is another question presented by the record, upon which much stress was laid at the argument. The petition asking for the establishment of the road described the proposed course with some particularity, and the order of the court directed the viewers to lay it out in accordance with the petition, and to assess the damages

sustained by reason of its establishment. The viewers made report that, "in accordance with the prayer of the petition and the direction and orders of the county court, we proceeded to and did * * * lay out, locate, and establish a road thirty feet in width, commencing," etc., which follows the line designated in the prayer of the petition, and "that said road was laid out on the most practical route from the point of commencement to the termination, and upon the route designated in said order appointing us as viewers, and in accordance with the prayer of the petition, and we so laid out said road as to do the least possible damage to the land over which it passed." It is urged that the order of the county court left no discretion with the viewers in the selection of the route of the road so as to do the least damage to the land over which it passed, and therefore that the court exceeded its powers. True, the order directs that the road shall be located in accordance with the petition, and this is the language of the statute. But the report of the viewers would indicate that they have located it so as to do the least possible damage to the lands over which it passes, while at the same time they show that they located it upon the line designated in the petition. This is equivalent, in our opinion, to saying that the line designated in the petition is the one which, after carefully viewing the situation, in the judgment of the viewers would do the least damage to the property owners, and this is the fulfillment of the statute.

5. It was intimated in the case of *Sullivan v. Cline*, 33 Or. 260 (54 Pac. 154), that it was probably not the intentment of the statute that the petitioner should set out the exact course on which it is desired the road should be laid, but that it is sufficient if the petition shows the place of residence, that it cannot be reached by any public road, and that it is necessary that the public and himself shall

have ingress to and egress from such residence. The petition in this case has gone further, however, and has designated the exact route; and while the court has directed that the road be located according to the petition, which may imply that it should be located upon the route therein defined, yet the report of the viewers shows that the road so laid out was located so as to do the least damage to the land through which it passes. The ultimate result was therefore in full accord with the intendment of the statute, and, while it may have proceeded somewhat irregularly, the purpose of the statute has been subserved, and the order establishing the road will therefore not be disturbed. The judgment of the court below will be affirmed, and it is so ordered. AFFIRMED.

Decided 17 September, 1900.

ON MOTION FOR REHEARING.

MR. JUSTICE WOLVERTON delivered the opinion.

6. The plaintiffs, by their petition for rehearing, present the further and additional question that the county court was powerless to establish the road in question without payment of the damages awarded by the viewers being first made. The statute provides that "the viewers * * * shall make a report * * * of the public road so located, and the amount of damages assessed by them, if any, and the person or persons entitled to such damages; and if the county court is satisfied that such report is just, and after payment by the petitioner of the costs of locating such road and the damages assessed by the viewers, the court shall order such report to be confirmed, and declare such road to be a public road, and the same shall be recorded as such." Hill's Ann. Laws, § 4077. After the preliminary recitals, the court concluded with the following entry: "It is hereby ordered, ad-

judged, and decreed that the report of said viewers be, and the same is hereby, approved and confirmed in all respects; that the said road be, and the same is hereby, decreed to be a road of public easement and a public county road, and the same is hereby established and ordered opened in accordance with the report of said viewers, upon the payment of the damages in said report set forth, and the costs and expenses of this proceeding." It is stoutly urged that here is a taking of the appellants' property without just compensation first assessed and tendered, contrary to the inhibition of the state constitution (Article I, § 18), but counsel have evidently misconceived the effect of the order. There was no appropriation of property, except upon condition of the payment of costs and damages. By its terms, there was no establishment of the road, nor could it be opened, except upon payment as required thereby. Hence the order or judgment as entered does not operate as a taking of appellants' lands without just compensation first assessed and tendered. The purpose of the statute is to require the payment of the costs and damages before any road or public easement can be established, and, while this provisional entry may not be in full accord with the statutory intendment, yet it was calculated to command compliance with the requirements of the law prior to any appropriation. The record shows that the costs and damages were paid into the hands of the county clerk upon the ninth day after entry of the order or judgment, and before the adjournment of the term, so that there could have resulted no possible injury to the appellants. The petition for rehearing is denied.

REHEARING DENIED.

Decided 2 July, 1900.

CURREY v. BUTCHER.

[61 Pac. 631.]

ATTORNEY AND CLIENT—PLEADING NEGLIGENCE.

1. A complaint alleging that defendants, a firm of attorneys, contracted with plaintiff to examine the title to certain land; that they so carelessly performed their duty that they failed to discover the existence of a judgment lien against the land; that afterwards, on discovering its existence, they fraudulently concealed it from plaintiff's knowledge, but permitted her to make the purchase, relying on their previous representations; that they then bought the judgment themselves, transferring it in trust to a third party, and compelled her finally to purchase it from him; states a cause of action for negligence in performing a duty which they, as attorneys, owed to their client, rather than a cause of action for breach of the contract of employment.

SUFFICIENCY OF PLEADING—DEFECTS CURED BY VERDICT.

2. In an action against a firm of attorneys for negligence in examining a title, objections to the introduction of evidence on the ground that the complaint did not set forth a cause of action because it did not describe the land; because it did not state that an execution could legally issue on the judgment alleged to have been a lien, and not reported; because it did not allege that the judgment debtors were insolvent; and because it did not appear that the judgment antedated the decree in the foreclosure suit brought by plaintiff's vendor against his judgment debtor, were properly overruled, such objections being merely technical, and going to an imperfect statement of a cause of action rather than a failure to state a cause. Such objections are cured by verdict, all intendments being in favor of the pleading when attacked during the trial.

HARMLESS ERROR—ESTOPPEL.

3. Where there is uncontradicted parol evidence, in an action against attorneys for negligence in examining a title, tending to show that plaintiff authorized her husband to employ defendants to make the examination, the admission of the record of a power of attorney from plaintiff to her husband, if error, is harmless, since, if the defendants were employed by the husband to act for the plaintiff, and did act in that capacity, they cannot defend the action on the ground that the husband had no authority to employ them.

OBJECTIONS NOT MADE AT THE TRIAL.

4. The supreme court will not consider an objection to the admission of testimony when first urged on appeal; attorneys should state the point of objection when the testimony is offered.

HARMLESS ERROR.

5. Evidence offered in support of an admitted allegation is immaterial but harmless.

SUFFICIENCY OF EVIDENCE—QUESTION FOR JURY—NONSUIT.

6. Where there is any competent evidence in support of a material allegation in a complaint, the case should be submitted to the jury, as they are the sole judges of the sufficiency of competent evidence.

TO WHOM ATTORNEY IS LIABLE FOR NEGLIGENCE.

7. An attorney is liable for negligence in the performance of his profession only to his client, and if the attorney was not aware that the person who employed him was the agent of a third person, there was no privity of contract between the attorney and such person, and no liability to him by the attorney for negligence under the employment.

87	380
40	32
87	380
43	61
37	380
46	242

From Baker : ROBERT EAKIN, Judge.

Action by Lulu P. Currey against W. F. Butcher and H. C. Eastham. The defendants are attorneys at law, and this action is brought against them to recover damages for an alleged negligent performance of professional duties. The complaint alleges, in substance, that, at all the times therein mentioned, the defendants were partners, engaged in the practice of law in the courts of Oregon, under the firm name and style of Butcher & Eastham; that in the month of June, 1898, they were employed by the plaintiff to manage and conduct negotiations relative to the purchase of certain real estate in Baker County, and to examine the public records of such county to ascertain whether such property was subject to liens by judgment, mortgage, or otherwise; that they agreed and undertook to make such examination, and afterwards stated and represented to the plaintiff that they had done so, and that there were no liens by judgment or otherwise on the land, except certain judgments and decrees known to both plaintiff and defendants; that plaintiff, believing such representations and relying thereon, and being advised and counseled by defendants that she might safely do so, entered into a written contract with the owners of the land, by the terms of which she purchased their right and title thereto for the sum of \$1,575; that in truth and in fact there was then existing on the records of such county a judgment in favor of one Griswold, and against P. R. Bishop, a former owner of the land, and one Stuller, upon which there was then a balance of \$575.87 due, which judgment was a lien upon the property referred to; that defendants failed and neglected to examine the public records of the county, or to discover such lien, or to advise plaintiff of the existence thereof, but, on the contrary, being informed

of its existence about the time plaintiff consummated the contract for the purchase of the land, they wickedly kept and concealed such knowledge from her, and fraudulently purchased the judgment for themselves, causing it to be assigned and transferred to one A. A. Kerr, who held the same in trust for them; that thereafter defendants procured other attorneys to act for and on their behalf, and to demand of plaintiff the payment of the amount due on such judgment, and, in the name of Kerr, their said trustee, had the land levied upon and advertised for sale; that during all such times the plaintiff was ignorant of the true ownership of the judgment, and was consulting and advising with defendants in relation thereto, and they were pretending to counsel with and advise her as her attorneys and counselors, and were charging her for said pretended services; that at and during said time, and before the plaintiff discovered the truth respecting the ownership of such judgment, she was compelled to and did employ legal assistance in the City of Portland, at an expense of \$150, and was put to other expense in sending an agent to Portland, and in telegraphing and telephoning, amounting, in the aggregate, to \$102.80; that, after plaintiff discovered the fraud the defendants had practiced upon her, she immediately endeavored to buy the judgment and stop the sale on execution, and did finally arrange with a relative of hers to buy the same for her, and on the twenty-fifth of February, 1899, consummated the purchase by paying to the defendants' agent the sum of \$350, the lowest sum defendants would accept for such judgment.

A motion to strike out all that portion of the complaint in reference to the purchase of the Griswold judgment by the defendants, and the expenditure of money by the plaintiff on account thereof, was overruled, and defendants answered separately. The defendant Butcher, by

his answer, denies all the material allegations of the complaint, except the partnership between himself and co-defendant, and the rendition, docketing and existence of the judgment in favor of Griswold and against Bishop and Stuller, and for a further and separate defense alleges that all or any services ever at any time performed by the firm of Butcher & Eastham, or either of them, in connection with the purchase, or contract for the purchase, of said lands, were done and performed for one H. E. Currey alone, and consisted of separate acts and services done under separate directions given by him, and for him only, and that there never was a general contract between them, covering negotiations for the purchase, or contract for the purchase, of any land whatever; that Currey never at any time requested of defendants, or either of them, to make a full or complete examination of the records of Baker County regarding the lands, or the title thereof; that defendant suggested to him, before any purchase was made, or any contract entered into concerning such lands, that he should procure an abstract for the purpose of ascertaining the true condition of the title, but he refused to have the same made, or to pay therefor. The defendant Eastham, by his answer, denies all the material allegations of the complaint, except the partnership between himself and the defendant Butcher, and the existence of the judgment of Griswold against Bishop, and, for a further and separate defense, sets up substantially the same facts pleaded by the defendant Butcher. A reply was filed, putting in issue the new matter contained in the answers. Upon the issues thus joined, a trial was had, resulting in a verdict and judgment in favor of the plaintiff for the sum of \$520, and the defendants appeal, assigning as error divers and sundry rulings of the trial court made during the progress of

the trial, and its refusal to give certain instructions requested by them.

REVERSED.

For appellants there was a brief and an oral argument by *Mr. W. F. Butcher, in pro. per.*, and *Mr. Thos. H. Crawford.*

For respondent there was a brief and an oral argument by *Mr. Dell Stuart.*

MR. JUSTICE BEAN, after stating the facts, delivered the opinion of the court.

1. After the jury had been impaneled, but before any evidence was offered, the defendants moved the court for an order requiring the plaintiff to elect whether she would rely for a recovery upon a breach of the contract of employment, or upon that feature of the complaint which charges that, in the course of the employment, the defendants purchased an outstanding title or lien on the property, to her damage. The overruling of the motion constitutes the first assignment of error. It was based upon the contention that the complaint states two causes of action,—one for a breach of contract, and the other in tort for certain alleged fraudulent acts of the defendants in the course of their employment, but, as we understand the pleading, the gist of the action is the negligence of the defendants in the performance of a duty which they owed to the plaintiff by reason of their employment. She avers that they undertook and agreed to examine for her the title to certain land which she contemplated purchasing, and that the work was so negligently and carelessly done that they failed to discover and report to her a judgment lien thereon, by reason of which she was damaged. Where one adopts the legal profession, and assumes to exercise its duties in behalf

of another for hire, the law imposes a duty to exercise reasonable care and skill, and if an injury results to his client from want thereof he is liable to respond in damages to the extent of the injury sustained. This duty and liability arises from the relation of the parties under the contract, rather than from the contract itself, and at common law the injured party could sue, either in assumpsit, for a breach of the implied promise, or in case, for the neglect of duty: 3 Enc. Pl. & Prac. 107. In the latter instance it is necessary to aver the contract of employment, showing the relation of attorney and client, as a matter of inducement, because without such contract there could be no duty to the plaintiff, and hence no liability. As stated by Mr. Justice McDONALD, in *Emigh v. Pittsburg, etc. R. R. Co.* 4 Biss. 114 (Fed. Cas. No. 4,449): "When there is a contract, either express or implied, from which a common law duty results, an action on the case lies for a breach of that duty, in which case the contract is laid as mere inducement, and the tort arising from the breach of duty as the gravamen of the action. Thus, if a lawyer or physician is engaged by special contract to render professional services, and if, in the performance of such services, he is guilty of gross ignorance or negligence, an action on the case will lie against him, notwithstanding such special contract." And Mr. Bliss, after quoting from Chitty that "the inducement or averment by way of introductory allegation is peculiarly proper where a party is charged upon, or in respect of, the breach of a contract or implied duty resulting from any particular character or capacity of defendant," says: "This doctrine is applied to declarations against attorneys, physicians and mechanics for negligence, and against carriers and innkeepers for loss of goods; the contract or possession of the property and

the injury being the gist or substance, while the allegations showing the occupation of the defendant, in reference to which the contract was made or the duty arose, show matter of inducement:" Bliss, Code Pl. (3 ed.) § 150. It is clear, therefore, that the averment of the contract of employment does not change the action from one of negligence on account of the failure of the defendants to perform the duty arising out of the relation of attorney and client to an action on contract. And the allegations in reference to the subsequent purchase by the defendants of the Griswold judgment, and the other matters in relation thereto, were properly pleaded as matter in aggravation of damages. The complaint, therefore, states but one cause of action, and there was no error in overruling the motion.

2. It is next urged that the court erred in overruling defendant's objection to the introduction of any evidence because the complaint does not state facts sufficient to constitute a cause of action. This objection having been raised upon the trial, the plaintiff is entitled to the benefit of all intendments in favor of the pleading which she could invoke after verdict: *Specht v. Allen*, 12 Or. 117 (6 Pac. 494); *Baker City v. Murphy*, 30 Or. 405 (42 Pac. 133, 35 L. R. A. 88). The particular objection made to the complaint seems to be that it is defective because (1) it does not describe the land which defendants were employed to assist the plaintiff in purchasing, or to which the lien of the Griswold judgment attached; (2) it appears therefrom that no execution could lawfully issue on the Griswold judgment without a revivor thereof; (3) it contains no allegation that Bishop and Stuller were insolvent; and (4) no averment that the Griswold judgment antedated the decree in the foreclosure suit of Balfour, Guthrie & Co. against Bishop. All these points

are technical, and amount only, in effect, to an objection that the cause of action is imperfectly stated ; and such objections are cured by verdict.

3. The next assignment of error is the action of the court in admitting the record of a power of attorney from the plaintiff to her husband, H. E. Currey ; but this, if error, was immaterial, for there is uncontradicted parol evidence tending to show that her husband had authority to act for her in the purchase of the land in question, and to employ the defendants to examine the title and assist in such purchase. If the defendants were employed by H. E. Currey to act as the attorneys for and represent the plaintiff in the purchase of the land and the examination of the title, and assumed to and did act in that capacity, they certainly cannot defend an action brought by her against them for negligence on the ground that H. E. Currey had not sufficient authority to employ them.

4. It is further insisted that the contract for the purchase and sale of the land, made by Balfour, Guthrie & Co. and the plaintiff, was improperly admitted in evidence, because its execution was not proven by the subscribing witnesses. A sufficient answer to this position is that no such objection was made to the introduction of the instrument when offered in evidence ; hence it is unavailing now.

5. The claim is also made that the court erred in admitting a certified copy of the judgment lien docket, showing the Griswold judgment ; but no issue was made in the pleadings upon that question, and therefore the admission of this testimony was immaterial, and could have affected no substantial interest of the defendants.

6. It is next contended that the court erred in overruling defendants' motion for a nonsuit, and in not instructing the jury to find a verdict in favor of the

defendants. This motion was based upon the contention that there was no proof that defendants were actually employed by the plaintiff to examine the title to the land referred to, or that the relation of attorney and client existed between them. It is sufficient to say that an examination of the record discloses that there was some evidence tending to support the plaintiff's claim upon this point. Its sufficiency was for the jury, and not the court. It is not necessary to quote or particularly refer to the testimony. Indeed, in view of the conclusion we have reached upon another point, which will necessitate a new trial, comment thereon would be improper.

7. Error is also assigned because the court refused to give the following instruction requested by the defendants: "If you find from the evidence in this case that the defendants, as attorneys, were employed by H. E. Currey to assist him in negotiating a purchase of the land named in the complaint, and to look up and pass upon the title thereto, and that at the time the defendants were so employed, and performed the work of looking up the title to said land, they had no knowledge or information that said H. E. Currey was acting as the agent of the plaintiff Lulu P. Currey, then I instruct you that the relation of attorney and client did not exist as between the plaintiff and these defendants, or either of them, in connection with such employment, and your verdict should be for the defendants." We think this instruction ought to have been given. The principal questions of fact seem to be (1) whether the defendants were, in fact, the attorneys of the plaintiff or of H. E. Currey; and (2) whether they were employed to examine and report upon the title to the land in question, or to do certain specific acts not embracing such examination. It was important, therefore, that the question of defendants' employment be clearly and distinctly submitted to the jury, so that they

might intelligently pass upon this feature of the case. "It is a general doctrine, sustained by an overwhelming weight of authority," says Mr. Justice VAN FLEET, "that an attorney is liable for negligence in the conduct of his professional duties, arising only from ignorance or want of care to his client alone; that is, to the one between whom and the attorney the contract of employment and service existed, and not to third parties:" *Buckley v. Gray*, 110 Cal. 339 (52 Am. St. Rep. 88, 42 Pac. 900, 31 L. R. A. 862). And Mr. Jaggard, in his recent work on Torts, says: "In actions against members of the bar for negligence it is well settled that only the person with whom the attorney contracts can maintain the action, for it is to him alone that the attorney owes a particular duty:" 2 Jaggard, Torts, 904. This rule, with its limitations, is adverted to and exhaustively discussed by the Supreme Court of the United States in the case of *Bank v. Ward*, 100 U. S. 195, which was an action for damages against an attorney by a party who loaned money upon a defective certificate of title to a certain piece of real estate, furnished by the attorney to another. It was held that the plaintiff could not maintain the action, because there was no privity of conduct between him and the attorney; the court saying: "Beyond all doubt, the general rule is that the obligation of the attorney is to his client, and not to a third party, and unless there is something in the circumstances of this case to take it out of that general rule, it seems clear that the position of the defendant must be sustained."

And so it has been held that an attorney employed to draw a will is not liable to a person who, through the attorney's ignorance or negligence in the discharge of his professional duties, was deprived of the portion of the estate which the testator instructed the attorney should be given such person by the will: *Buckley v. Gray*, 110

Cal. 339 (52 Am. St. Rep. 88, 42 Pac. 900, 31 L. R. A. 862). And again, an attorney employed by a mortgagee to examine the security, and who gives his client a certificate of title, is not liable to an assignee of the mortgagee for loss by reason of error in the certificate: *Dundee Mtg. Co. v. Hughes* (C. C.), 20 Fed. 39, and note to same, 24 Am. Law. Reg. 197, 202; 2 Shearman & Redfield, Neg. (5 ed.) § 562; Mechem, Agency, § 836. Unless, therefore, the relation of attorney and client existed between the plaintiff and the defendants, she cannot maintain an action against them for negligence in examining the title for another; nor is this rule any the less applicable in this case because H. E. Currey may have, in fact, been the agent of the plaintiff and acting for her in the employment of the defendants, unless that fact was known to them. The relation of attorney and client is a personal relation, and can only be entered into by the consent of both parties. Mr. Weeks says: "It is said that two things are necessary to establish the relation between attorney and client: (1) The agreement of the attorney to be an attorney for the party; and (2) the agreement of the party to have the other for an attorney." Weeks, Attys. at Law (2 ed.), § 185. If the defendants knew, as plaintiff contends, that H. E. Currey was, in fact, the agent of and acting for the plaintiff, and so employed them, they would, of course, be liable to her the same as if the employment was by her in person; otherwise, not.

It may be urged that the court substantially instructed the jury in accordance with the rule of law above indicated, in its general charge, but we cannot concur in that view. It is true, the court charged the jury in two or three instances that, to enable the plaintiff to recover, she must establish by a preponderance of the evidence that she employed the defendants to look up the title to the

land, as to liens thereon, etc.; but, in view of the two important questions of fact, these instructions could well be understood by the jury to apply particularly to the character of the defendants' employment, rather than to the person by whom they were employed. In any event, the defendants were entitled to have the question clearly and distinctly submitted to the jury, and it was error for the court to refuse the instruction requested upon this point.

The defendants also requested the court to charge the jury that: "The gist of this action is the breach of an alleged contract by the defendants, as the attorneys of plaintiff, in failing to discover certain defects in the title to real estate claimed to have been purchased by the plaintiff, which defect consisted of an outstanding judgment lien, which judgment lien the plaintiff was afterwards compelled to buy at a cost of \$350; and, before plaintiff can recover in this case, she must establish, by a preponderance of the evidence, this contract of employment and the breach thereof; and, failing to do that, the fact that the defendant Eastham afterwards, in November, purchased this judgment, and compelled the plaintiff to pay him therefor the sum of \$350, would not make, and cannot make, the defendants liable in this action. The only matter you can consider the purchase of this judgment by the defendant Eastham for is in ascertaining and determining the amount of damages the plaintiff is entitled to recover, provided she satisfies you by a preponderance of the evidence that the defendants, prior to such purchase, in June, 1898, negligently and carelessly failed to discharge their duty as attorneys under her employment of them in negotiating the sale and looking up the title to this land, if such employment ever existed." This instruction was evidently intended to advise the jury that the plaintiff was not entitled to

recover in this action solely on account of the purchase by the defendant Eastham of the Griswold judgment, some months after the contract for the purchase of the land was entered into by the plaintiff; and it was proper that the jury should have been so instructed upon this feature of the case. As before suggested, the gist of the action is the negligence of the defendants in failing to discover and report the Griswold lien; and, unless such negligence is shown, the purchase by the defendants, or either of them, of the outstanding judgment lien, would not, in itself, expose them to liability to the plaintiff in this action. The proposed instruction quoted is open to some objection, and was perhaps properly refused on account of its language, because, among other things, it states that the action is for the breach of an alleged contract, when, as we have seen, it is an action of negligence pure and simple; yet the point referred to should have been covered by the instructions of the court.

For the refusal to give the instruction requested, in reference to the employment of the defendants by H. E. Currey, the judgment of the court below must be reversed, and the cause remanded for a new trial; and it is so ordered.

REVERSED.

Decided 9 July; rehearing denied 19 November, 1900.

GARDNER v. WASCO COUNTY.

[61 Pac. 834.]

NEGLIGENCE OF COUNTIES—STATUTORY CONSTRUCTION.

1. Sess. Laws, 1893, p. 141, providing that parties having no knowledge of the defective condition of a highway may recover damages from the county for injuries caused thereby, merely expresses the common law, and must be interpreted by the rules there enforced as to exercising care corresponding to the danger.

NEGLIGENCE OF COUNTY—ICE ON HIGHWAY.

2. An icy road ran down a steep hill along a gulch, making a sharp turn out around a point of rock near the bottom. As plaintiff was driving down the road with a heavy load, his horses slid on the ice, but were kept on the road as far as the turn, where they were precipitated into the gulch with their load. *Held*, in an action against the county, that the question whether a negligent construction and maintenance of the road was the proximate cause of the damage should have gone to the jury.

CONTRIBUTORY NEGLIGENCE—ICY HIGHWAY.

3. An icy road ran down a steep hill along a gulch, making a sharp turn about fifty rods from the bottom. As plaintiff, who knew its condition, was driving down the road with a heavy load, his horses slid on the ice, and were precipitated into the gulch with the load. His harness had no breeching, and his horses were unshod. *Held*, that the question whether plaintiff was guilty of contributory negligence should have been submitted to the jury, since it was incumbent on him to exercise only that degree of care commensurate with the danger.

HIGHWAYS—KNOWLEDGE OF DEFECT—WARNING—STATUTES.

4. Under a statute providing that whenever a traveler on a county highway, without contributory negligence, and "not having been warned of the defect or danger by notice or otherwise," sustains any loss, damage or injury, he may recover damages, etc. The clause, "not having been warned of the defect or danger by notice or otherwise," refers to written or printed notice given when roads are found unsafe, and of otherwise warning travelers by means of barriers; and a knowledge of the defect is not equivalent to the warning referred to in such clause, and does not preclude recovery where the traveler used care proportionate to the danger.

From Wasco: W. L. BRADSHAW, Judge.

Action by Henry Gardner against Wasco County to recover damages for injuries caused by sliding off a hill-side county road. There was a judgment of nonsuit, hence this appeal.

REVERSED.

For appellant there was a brief over the name of *Moore & Gavin*, with an oral argument by *Mr. J. F. Moore*.

For respondent there was a brief over the names of *A. Jayne*, District Attorney, and *W. H. Wilson*, with an oral argument by *Mr. Wilson*.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

This is an action to recover damages for an injury alleged to have been caused through the faulty and negligent construction and repair of a county road. The road in question runs along the course of a gulch at a steep incline, and was constructed by grading along the north and northeast side of a hill. From the foot of the hill the road runs up comparatively straight for fifty yards or more, where it makes a sharp turn around a point of

rock, and thence continues on a slight curve for some three or four hundred yards. In going down the grade, the point of rock makes it necessary to turn slightly to the right, and, when it is reached, to turn sharply to the left, and from this straight ahead to the foot of the hill. The roadbed at the point consists chiefly of solid rock, is from six to eight feet in width, and slopes toward the gulch; the inner side being some five to seven or eight inches higher than the outer edge. Above the point some thirty or forty yards, and at or near a turnout in the road, ditches for draining had been dug diagonally across it some time previous to, and probably within the year of, the accident, but no attempt had been made to construct a ditch next to the bank to carry away the water coming from the hillside. Aside from the fact that the grade had been washed more or less by the fall rains, which may have affected its lateral slope somewhat, the road had been practically in the condition indicated for many years, of which the defendant had ample notice. The plaintiff had lived in the neighborhood some four or five years, had passed over the road frequently, and was well acquainted with its general condition. A few days before the accident occurred, the ground in the vicinity was covered with ice, which rendered the surface very slippery; but on the Sunday night and Monday morning previous thereto it had disappeared generally, but, by reason of the road being on the north side of the hill, the ice thereon had not entirely thawed out. On Wednesday morning the plaintiff, accompanied by his wife, started to The Dalles from Mr. Haverly's place, in a wagon loaded with some twelve hundred pounds of barley, drawn by two horses, weighing about one thousand and fifty pounds each. In attempting to descend the hill, he unexpectedly encountered the ice, some two or three hundred yards above the rock point, and his horses began to slide. By

strenuous effort he was enabled to hold them in the road until he passed the point of rock about forty feet, when they left it, precipitating the outfit into the gulch, whereby the injuries were received of which the plaintiff complains. The horses were unshod, the harness was without breeching or holdback straps, and the brake failed to respond when plaintiff attempted to apply it from the time he encountered the ice. In testifying in his own behalf, he said: "I was coming down the hill, and struck the ice, and tried to stop; but, just as quick as my horses' feet struck the ice, they commenced sliding on down the hill, and the load itself pushed them right down. I held them into the road till I got to that point of rock that was mentioned, and turned over. They couldn't make the turn. The wagon forced them on down off the grade. * * * They went off the grade about forty feet below the point of rocks." When questioned about the brake, he further stated that "the brake wouldn't hold any on the wagon. The wheels would slide on it. Wasn't any use whatever. That it wouldn't work." That, had it not been for the ice, he would have gone along all right,—and attributed the difficulty to the ice. When he had concluded his evidence, the defendant moved for a nonsuit, which was granted, and, judgment having been entered accordingly, the plaintiff appeals.

Preliminarily, it is urged that the road in controversy was not shown to be a legal highway but there was sufficient evidence in the record to go to the jury upon that subject, and the inquiry should have been left to them.

1. And, again, it is urged that, plaintiff having had knowledge of the condition of the road, he is expressly precluded by the statute from pursuing the remedy given against a county for the recovery of damages incurred

while traveling upon a defective highway. The evident purpose of the statute is to give a right of action against a county for compensatory damages in like and similar cases as it exists ordinarily against individuals or private corporations. The clause of the statute, "not having been warned of the defect or the danger by notice or otherwise" (Laws 1893, p. 141), simply expresses the common law condition upon which recovery may be had, and must be interpreted by the rules as they are, thereby ascertained and settled.

2. The question for determination is whether the nonsuit was properly granted. The burden of proof is upon the plaintiff to establish the alleged negligence of the defendant. The defendant contends that the plaintiff has not only failed in this regard, but has shown such contributory negligence as will also prevent his recovery. It must be conceded the testimony tends to show that the road passing the point where the accident occurred was not as skillfully constructed, nor in as good and suitable repair, as it might have been. The point of rock requiring the sharp turn in the driveway, the steep descent, the narrowness and the lateral slope of the road, rendered it more or less unsafe at that particular locality. It had been traveled for more than twenty years, however, during all of which time it had been in much the same condition as at the time of the accident, barring the accumulation of ice in the roadbed. It was sought to be shown, and there is some evidence tending in that direction, that the accumulation of ice in the road was caused by the faulty construction and bad repair thereof, and, therefore, it is argued, the injury was attributable to the negligence of the defendant in allowing the road to remain in such condition. Generally speaking, mere slipperiness, arising from a smooth surface of ice or snow upon a highway, is not such a

defect as will render a municipality liable for injuries sustained on account thereof: Beach, Contrib. Neg. (3 ed.) § 272; *Stanton v. City of Springfield*, 12 Allen, 566; *Pinkham v. Topsfield*, 104 Mass. 78. If, however, by reason of some structural defect in the highway, ice is caused to accumulate thereon so as to render it unsafe for use or travel, quite a different question is presented. It depends, then, upon which may be considered the proximate cause of the injury. Where the formation is smooth and level, and injury results, the authorities seem to be divided as to which to attribute the proximate cause—whether to the structural defect or to the ice formation. Where it is attributed to the ice, it is held to proceed from a natural cause for which the municipality is not responsible; but, upon the other hand, when it is attributed to the structural defect, liability is held to attach: *Chamberlain v. City of Oshkosh*, 84 Wis. 289 (36 Am. St. Rep. 928, 54 N. W. 618, 19 L. R. A. 513); *Adams v. Chicopee*, 147 Mass. 440 (18 N. E. 231). Where, however, there is a faulty construction or neglect of repairs conducive to the accumulation of ice in the highway, and both the defect and the ice concur in contributing to the injury, the cause may be ascribed to the defect, provided the injury would not have resulted but for it, although the presence of the ice may be a contributing cause also.

A rule applicable to such condition has been adopted in New York, and is stated by Mr. Justice EARL, in *Ring v. City of Cohoes*, 77 N. Y. 83 (33 Am. Rep. 574), as follows: "When two causes combine to produce an injury to a traveler upon a highway, both of which are in their nature proximate,—the one being a culpable defect in the highway, and the other some occurrence for which neither party is responsible,—the municipality is liable, provided the injury would not have been sustained but for

such defect." It is stated in a slightly different form in *Searles v. Manhattan Ry. Co.* 101 N. Y. 661 (5 N. E. 66), viz.: "When the fact is that the damages claimed in an action were occasioned by one of two causes, for one of which the defendant is responsible and for the other of which it is not responsible, the plaintiff must fail, if his evidence does not show that the damage was produced by the former cause. And he must fail, also, if it is just as probable that they were caused by the one as by the other, as the plaintiff is bound to make out his case by the preponderance of evidence." And it finds illustration in a still later case: *Taylor v. City of Yonkers*, 105 N. Y. 202 (59 Am. Rep. 492, 11 N. E. 642). It was alleged therein that ice had formed on a sidewalk, sloping towards the curb, and the complainant received injuries while attempting to walk thereon. The learned judge who wrote the opinion was led to remark, in view of the rule, that "if that slope was one concurring cause of the fall, without which the accident would not have happened, the city is liable." It was held, however, that the rule had been erroneously applied in that case, by ascribing the primary or proximate cause to the structural defect of the sidewalk; but the following comment elucidates the appropriate application: "The plaintiff slipped upon the ice. That by itself was a sufficient, certain and operating cause of the fall. No other explanation is needed to account for what happened. It is possible that the slope of the walk had something to do with it. It is equally possible that it did not. There is not a particle of proof that it did. To affirm it is a pure guess and an absolute speculation. Are we to send it to a jury for them to imagine what might have been? The great balance of probability is that the ice was the efficient cause. There is no probability, not wholly speculative, that the slope was also such. Its descent was slight,—not quite an inch in a

foot, and not more than constantly occurs in the streets of a city. No knowledge or intelligence can determine or ascertain that such a slope had any part or share in the injury, and to send the question to the jury is simply to let them guess at it, and then upon that guess to sustain a verdict for damages."

The rule appears to be founded upon reason, and has impressed us as the proper one to adopt in the present case, thereby making the solution of the controversy practical and easy. The evidence tends to show that the road was faulty in construction around the point of rock, and out of repair; that it was steep, narrow and sloping from side to side at an unusual angle, with a sharp turn around the point; that it was so constructed or illy repaired as to cause or permit the ice to form upon its surface; and that all these conditions combined to contribute to the accident of which the plaintiff complains. Now, if it can be said that the narrowness, the slope, the sharp turn in the road, and the lack of proper drainage, constituted the one concurring cause of the accident, without which it would not have happened, then the county would be liable. Unlike the case of *Taylor v. City of Yonkers*, 105 N. Y. 202 (59 Am. Rep. 492, 11 N. E. 642), it might reasonably be inferred that the slope at the point of rock, the narrowness of the road, the sharp turn in it, and the lack of proper drainage, constituted the primary and efficient cause of the accident, while the ice formation may have been also a contributing cause. It was therefore a proper question for the jury to determine, under all the conditions and circumstances, whether the county was negligent in the construction and repair of the road in question, and, if so, whether such negligence contributed to plaintiff's injury, as the proximate cause.

3. This brings us to the inquiry whether the plaintiff

has been guilty of such contributory negligence that the court will say, as a matter of law, will preclude his recovery. He was acquainted with the structural condition of the road, for he had traveled it for several years, had hauled wheat over it the preceding fall, and passed over it shortly prior to the accident. He must be charged, therefore, with knowledge of its faulty character and bad repair. This fact, however, does not restrain his use of it to such an extent as to relieve the county of liability. He may yet exercise his privilege of traveling upon it, but, if he would recover for any damages sustained, he must exercise a degree of care commensurate with the danger: Beach, Contrib. Neg. (3 ed.) § 249. This must be such as common prudence and reason would dictate, and whether he is negligent in the exercise of such care and prudence is ordinarily a question for the jury to determine under all the attendant and surrounding facts and circumstances. The fact was established that his horses were unshod, his harness was without suitable appliances for holding the wagon with its load, and that his brake would not respond when he attempted to apply it, and it is argued that these deficiencies were sufficient to preclude a recovery. He attributes the failure of the brake to take hold solely to the agency of the ice, and, but for its presence, he thinks he would have passed down safely. This latter is his opinion only, and constitutes a conclusion which should not be considered in ascertaining the cause.

"It is the general rule," say the authors of 15 Am. & Eng. Enc. Law (2 ed.), 474, "that one is not precluded from recovery for injuries caused by a defective highway by the fact that defects in the vehicle or harness, or vices in the horse, contributed also to the accident, provided these defects were not actually, or constructively known to him." One may infer that the defect in the brake

was unknown to the plaintiff, and it is probable he was without knowledge of the presence of the ice until he actually encountered it, when it was too late for him to retrace his steps. These were conditions for which he was not responsible or accountable, and would not, therefore, under the rule, preclude a recovery, and hence may be eliminated from the consideration of the inquiry whether, as a matter of law, he was negligent. Of course, if he had known of the defective brake, quite another question would have been presented, as it would have added another and perhaps fatal element in the matter of contributory negligence.

The plaintiff was aware, however, of the condition of his harness and horses; and the inquiry now turns upon the question whether these defects alone, combined with the plaintiff's knowledge of the faulty condition and repair of the road, constitute negligence *per se* upon his part in essaying to travel upon it under such circumstances. "To constitute contributory negligence," says Beach, "there must be a want of ordinary care on the part of the plaintiff, and a proximate connection between that and the injury:" Beach, Contrib. Neg. (3 ed.) § 7. These two elements are necessary, and must concur in producing the result. They are illustrated by the two questions, "Did the plaintiff exercise ordinary care under the circumstances?" and, "Was there a proximate connection between his act or omission and the hurt he complains of?" So it is here. We must be able to say, first, whether the plaintiff could, with ordinary care and prudence in the preparation of his team and tackle for the trip, have avoided the accident, in view of the load he designed to carry and the condition of the road. Would a man of reasonable prudence and foresight have entered upon the journey with his team and harness in the condition herein

described, knowing that he would have to make use of a faultily constructed and illy repaired road, such as lay in the course of his travel? And, secondly, was the want of common prudence in this respect, if such it be found to be, the proximate contributing cause of the injury?

Upon the proposition thus stated it is apparent that reasonable minds may differ; that is, the conclusion that he did not use ordinary care under the circumstances and conditions, or that such want of prudence, if such it was, was the proximate contributing cause, does not necessarily follow. In such a case, there being a reasonable doubt upon the subject, the question, as we understand it, is always for the jury. We have, in our analysis of the subject, eliminated the fact of the condition of the brake and the presence of the ice in this latter phase of the case, because they were matters unknown to the plaintiff, under the evidence as it now stands, or at least the preponderance of it; but the question of his foreknowledge of these facts is ordinarily one for the jury, also, and, of course, if he had such knowledge, then the matter of his want of care would become much graver, if, indeed, it would not preclude his recovery as a matter of law. Being of the opinion that the questions touching the proximate and primary cause of the injury and the fact of contributory negligence were for the jury, the judgment of the court below will be reversed, and the cause remanded for a new trial.

REVERSED.

Decided 19 November, 1900.

ON PETITION FOR REHEARING.

MR. JUSTICE WOLVERTON delivered the opinion.

4. By a strongly reasoned petition for rehearing it is contended that we misconstrued the statute rendering the county liable in damages for injuries sustained by per-

sons lawfully traveling upon a legally constituted highway by reason of defects therein. We were, perhaps, too brief in our former discussion to be well understood. The statute provides that "whenever any individual, while lawfully traveling upon a highway of this state, the same being a legal county road, shall, without contributory negligence on his part, and not having been warned of the defect or danger by notice or otherwise, sustain any loss, damage or injury, * * * he shall be entitled to recover compensatory damages," etc.: Sess. Laws, 1893, p. 141. This has given a remedy where none formerly existed, but the general rules of the law touching the negligence of the county and contributory negligence of the complainant are applicable, as in similar actions of negligence against individuals or private corporations. The clause, "not having been warned of the defect or danger by notice or otherwise," has reference, and was intended, no doubt, to give effect, to the custom of the counties in giving notice of the bad condition of roads and bridges within their supervision where found to be so defective as to be dangerous and unsafe for public use or travel. The public safety and welfare require that they take such precaution to prevent injury, being charged with the duty of keeping the highways in suitable condition and repair. The warning may be given otherwise than by notice, which, by common understanding, is written or printed. It may be by obstructions or barriers intended as signals of danger and to divert travel. "If the way becomes dangerous or impassable," says Mr. Elliott, "it must be protected; and fences, barriers or other means must be used to warn travelers of the danger:" Elliott, Roads & S. 458. So it was held in *Erie City v. Schwingle*, 22 Pa. St. 384 (60 Am. Dec. 87), in effect, that, if the officers of the borough permitted the street to be used, without warning the pub-

lic of its imperfect condition, they cannot charge the plaintiff with inexcusable negligence or want of ordinary care in using it. These references sufficiently illustrate our meaning without further comment. Now, a person not having been so warned has his action, and knowledge is not the equivalent of such warning, and was not so intended by the legislature. Of course, knowledge of a defect, and the use of the road or bridge with such knowledge, is evidence of negligence; but, if care is shown commensurate with the danger, still the action will lie. The warning by the county relieves it from liability, for, if persons essay to venture upon the road or highway thereafter, and before proper repairs are made, they do so at their own risk. It would have been an easy matter for the legislature to have used the expression "without knowledge," instead of, or in addition to, the words "not having been warned," etc.; and we must assume that, if it intended knowledge of the defect to be the equivalent of the warning referred to, it would have said so quite as briefly and directly. But, having used the other expression, we think it should be interpreted as we have indicated herein. The petition for rehearing will be denied. REHEARING DENIED.

Decided 9 July, 1900.

STATE v. BLIZE.

[61 Pac. 735.]

EXECUTED CONTRACTS—EFFECT OF FRAUD.

1. Where a contract has been executed between competent parties, founded on a valuable consideration, and not legally objectionable or inherently wrong, it is valid and binding between the parties, regardless of fraud practised in securing its execution.

RESCISSION—RETURN OF CONSIDERATION.

2. A party to a contract cannot rescind it while retaining benefits received under it.

VALIDITY OF ACTS DONE UNDER AN UNCONSTITUTIONAL LAW.

3. An act done in pursuance of a statute apparently legal must be considered, in a suit between the immediate parties, as having been lawfully done, though subsequently the statute is declared void.

QUIETING TITLE—WAIVING OBJECTION TO JURISDICTION.

4. In suits to determine adverse interests to realty the objection to the jurisdiction because the defendant is in possession must be taken by a proper plea, or it will not be considered; particularly is this true where the defendant asks affirmative equitable relief: *O'Hara v. Parker*, 27 Or. 156, followed.

From Union: ROBERT EAKIN, Judge.

This is a suit by the State of Oregon to determine an adverse claim to real estate. The complaint alleges that the state is the owner in fee and in possession by its tenant, Oliver, of the land in controversy; that defendants, and each of them, claim an interest or estate therein adverse to the plaintiffs, whereupon it prays that each of them be required to set forth by answer the nature and character of his interest or estate, so that its validity may be adjudged. The defendants Hutchinson Brothers, who alone answered, deny the state's title and possession, and, for an affirmative defense, aver that in 1893 the state, by its authorized agents, the Governor, Secretary of State, and Treasurer, falsely and fraudulently agreed with the defendants that, if they would execute to it a good and sufficient deed to the land described in their answer, it would within eighteen months thereafter erect thereon, and upon the other land mentioned and described in the complaint, buildings and improvements for public purposes at a cost and value of not less than \$165,000; that it was expressly agreed at the time that the whole of the land so described should be used and occupied for public purposes only, and that until the state fully performed its part of the contract the defendants were to remain in the exclusive possession of the premises as the owners thereof; that, if it should fail or refuse to use the land for the purposes indicated, the title thereto should remain in the defendants, and any deed executed by them should be void and of no effect; that the performance of such agreement and contract by the state was the only

and sole consideration for the transfer ; that it has wholly failed and refused to comply with its agreement or perform any part thereof, or pay defendants any consideration for the land ; that, if the state had performed its agreement, the defendants would have been benefited, and the value of their other property increased and enhanced, in the sum of not less than \$10,000, and that they are damaged by its failure to perform its agreement in such sum ; that it was further understood that, if the defendants would execute to the state a deed for the land, they would receive therefor, in addition to the performance of such contract and all other considerations, the sum of \$1,400, no part of which has ever been paid to these defendants, or either of them, and that they have never received any consideration from the state or any one for such lands ; that the market value thereof was at the time of making the contract, and ever since has been, \$60 per acre ; and that the defendants would not have sold the same for any other purpose than to be used as a branch insane asylum, as represented by the agents of the state.

For a further and separate defense they aver that the state should be estopped from asserting title or right of possession to any of the lands described in their answer, for the reason that they were purchased under and by virtue of an act of the legislature entitled "An act to provide for the location and construction of a branch insane asylum in the eastern portion of Oregon, and appropriating money therefor," filed in the office of the Secretary of State February 21, 1893, which was subsequently held to be unconstitutional and void, whereupon the defendants demand that a decree be entered declaring that they are the owners in fee of the lands described in their answer, and that the state take nothing by the alleged deed from them ; that it be forever barred from asserting

any claim to such lands, or any part thereof, by virtue of such deed; and that they have and recover of and from the state the sum of \$10,000,—and for such other and further relief as in equity and good conscience may appear just and meet. The reply puts in issue the affirmative allegations of the answer, and pleads as an estoppel a conveyance by the defendants of the land in controversy to the state on the seventeenth day of November, 1894, for the consideration of \$5,600, which was then and there paid to and received by them, and which they have ever since retained. Upon the issues thus joined the suit went to trial before the court, and the defendants offered evidence tending to show that at the commencement of the suit the state was not in possession of the land in controversy. The court refused to permit the introduction of such evidence on the ground that the defendants, by their answer, had waived that issue. A decree was rendered in favor of the plaintiffs, from which the defendants appeal.

AFFIRMED.

For appellants there was a brief over the names of *Chas. H. Finn* and *Leroy Lomax*, with an oral argument by *Mr. Finn*.

For respondent there was a brief and an oral argument by *Mr. Thos. H. Crawford*.

MR. CHIEF JUSTICE BEAN, after making the foregoing statement of the facts, delivered the opinion.

It is uncontroverted that in 1894 the board of commissioners of public buildings purchased from the defendants Hutchinson Brothers 140 acres of land in Union County for a branch insane asylum, under an act of the legislature approved February 21, 1893 (Laws 1893, p. 136), and paid therefor the sum of \$5,600. The land

was conveyed to the state by warranty deed, regularly executed and delivered, but, by agreement, the defendants were permitted to occupy it during the seasons of 1895 and 1896, and thereafter continued to so occupy and farm the same up to the time it was leased by the state to Oliver, in the spring of 1899, and for the purposes of this suit it must be assumed that at the commencement thereof they were so in possession. Upon these facts the only questions presented for our determination are (1) whether the state had legal capacity to take title to the real estate in question at the time the deed from the defendants was executed and delivered to it; and (2) whether the court below had jurisdiction of the controversy between the parties.

1. The questions of fraud and misrepresentation, and of the alleged failure of the state to comply with its agreement to use the land for public purposes only, are wholly immaterial in this suit. An executed contract between competent parties, founded on a valuable consideration, not immoral or prohibited by statute or against public policy, is not void, as between the parties, however fraudulently obtained; nor will a conveyance of real estate be avoided by the subsequent failure of the grantee to pay the consideration as agreed upon.

2. And, moreover, it is elementary law that a party cannot disaffirm a contract and retain the fruits thereof. If he desires to rescind, he must return or offer to return whatever he has received under it: 1 Beach, Mod. Eq. Jur. § 76; *Frink v. Thomas*, 20 Or. 265 (12 L. R. A. 239, 25 Pac. 717); *Scott v. Walton*, 32 Or. 460 (52 Pac. 180); *Vaughn v. Smith*, 34 Or. 54 (55 Pac. 99); *Och v. Mo. K. & T. Ry. Co.* 130 Mo. 27 (31 S. W. 962, 36 L. R. A. 442). No offer has ever been made by the defendants to return the money received by them from the state for the land in question; nor, so far as this record discloses, have

they ever expressed a willingness to do so; hence they are not entitled to relief in this suit, even if the deed be voidable. They are compelled to rely upon the naked legal proposition that the deed to the state is absolutely null and void because the state had no capacity to take the title—in short, that there was no conveyance, because there was no grantee, and so the title never in fact passed out of them. But there is no merit in this contention. That the state can take and hold title to real estate is unquestioned, and if, in a given instance, a conveyance is made to it for an unauthorized purpose, it is not void, however it may be regarded in a proceeding instituted for the purpose of canceling and setting it aside. If the purchase of the land from the defendants was unauthorized, the deed is voidable only, and, before it can be rescinded at the suit of the grantors, they must return or offer to return the money paid them as a consideration therefor.

3. Nor does the fact that the act of 1893 was declared unconstitutional and void, after the purchase made under it had been consummated and the title vested in the state, render the deed a nullity: *King v. Philadelphia Company*, 154 Pa. St. 160 (35 Am. St. Rep. 817, 26 Atl. 308, 21 L. R. A. 141). The purchase was accomplished under color of lawful authority, and at a time when the law was presumptively valid, and therefore must be regarded as having been lawfully made. The deed, being regular in form and properly executed, vested the title to the land in the state as effectually as if purchased for some authorized purpose, even if it might be subject to cancellation in a proper proceeding.

4. It is further insisted that the court was without jurisdiction because the state was not in possession of the land at the time of the commencement of the suit. The defendants interposed no objection to the jurisdic-

tion of the court below by plea or answer, but answered to the merits, and set up matter as a basis for affirmative relief, and prayed the court to order and decree that the deed made by them to the state is void on account of fraud and misrepresentation, and therefore that the state took nothing thereby. The relief prayed for is such as a court of equity alone could administer, and in thus submitting themselves to the jurisdiction of the court, and asking for affirmative relief, they waived their right to insist that the court was without jurisdiction because the state was not in possession at the time the suit was commenced. This question is fully discussed in *O'Hara v. Parker*, 27 Or. 156 (39 Pac. 1004), wherein Mr. Justice WOLVERTON, speaking for the court, says: "It is said that proof of possession and title is necessary to entitle a party to recover in a suit to remove a cloud from title; but where the parties say, in effect, by their pleadings and contentions before the court, that they want specific relief, which alone a court of equity can administer, without regard to the court's especial jurisdiction, there can exist no good reason why the court should not grant the prayer, if it has jurisdiction of the subject-matter. The objection to the jurisdiction not appearing upon the face of the complaint, it should have been taken by some appropriate plea challenging the right of the plaintiff to proceed in equity, failing in which, and by his demand for affirmative equitable relief, the defendant has waived his right to now insist that the court is without jurisdiction because the plaintiff is without possession." Counsel, in their argument, seem to have confused the fact of jurisdiction with its exercise. A court of equity unquestionably has jurisdiction to remove a cloud from title, but, as a condition to its exercise, the plaintiff is required to be in possession of the premises; for otherwise, if he is the owner of the legal title, the law affords him ample

relief. But, as said in *O'Hara v. Parker*, 27 Or. 156 (39 Pac. 1004), "this condition, however, can be waived by the parties, and, if the court proceeds with the exercise of jurisdiction, it can grant the equitable relief appropriate in such cases." It follows, therefore, that the defendants must be deemed to have waived the objection to the state's right to relief because it was not in possession of the land at the time of the commencement of the suit, by submitting themselves to the jurisdiction of the court in asking affirmative relief in their answer. The decree of the court below is affirmed. **AFFIRMED.**

Decided 9 July, 1900.

NODINE v. WRIGHT.

[61 Pac. 784.]

UNSETTLED TRUST—ACTION FOR DAMAGES.

While a trust is unsettled, and until there has been an accounting by the trustees, a law action cannot be maintained either for damages or for money had and received.

From Union : ROBERT EAKIN, Judge.

Action by Fred. Nodine and wife against W. T. Wright and others to recover damages for an abuse of a trust in favor of creditors. From a judgment in favor of defendants, plaintiffs appeal. **AFFIRMED.**

For appellants there was a brief over the names of *Leroy Lomax* and *Smith & Heilner*.

For respondents Wright, Townley, and First National Bank there was a brief over the name of *Thos. H. Crawford*.

For respondents Ainsworth Bank and J. P. Marshall there was a brief over the name of *Chamberlain, Thomas & Kraemer*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

This is an action at law against W. T. Wright, F. A. E. Starr, W. J. Townley, F. L. Richmond, J. P. Marshall, the Ainsworth National Bank of Portland, and the First National Bank of Union, to recover \$150,000 damages. The complaint, in substance, is that in April, 1894, plaintiffs were the owners and in possession of a large amount of real and personal property in Union County, of the alleged aggregate value of \$166,100, and were in debt to divers and sundry persons, including the defendants First National Bank and Townley, in the sum of about \$40,000; that they were being harassed and annoyed by various creditors, including defendants, and feared that if their property was sold on execution they would suffer great loss; that by reason of certain false and fraudulent representations they were induced to and did convey by deed and bill of sale all of their real and personal property to the defendants Richmond and Wright, in trust, however, and upon the terms and conditions that they would dispose of the same as soon as they might consider it for the best interest of the plaintiffs, at a price not less than \$27.50 per acre for the real estate, and out of the proceeds pay the plaintiffs' debts, taxes, interest and such costs as might accrue upon or by reason of such indebtedness, and return to the plaintiffs four-fifths of the surplus, the defendant Starr to have one-fifth thereof as compensation for his services in advising and counseling the trustees; that, immediately upon securing possession of such property, Richmond and Wright, in violation of their trust, and with intent to cheat, wrong and defraud the plaintiffs, sold the property to their friends and business associates for much less than its market value, and much less than they could have obtained by the exercise of ordinary diligence and common honesty; that all the property has

been thus disposed of, and only about \$10,000 of plaintiffs' debts have been paid; that these sales were made for and inured to the mutual benefit of defendants, and to the great injury and damage of plaintiffs in the sum of \$150,000.

It appears from the complaint that it will require an accounting before the liability of the trustees, if any, can possibly be ascertained. The trust has never been closed, but remains open, and, under such circumstances, it is manifest the plaintiffs' remedy is in equity, and not at law. A *cestui que* trust cannot maintain an action at law against a trustee while the trust is still open. The execution and enforcement of trusts, the adjustment of disputed rights thereunder, and the settlement of accounts between the *cestui que* trust and the trustee, are questions which naturally fall within the primary and exclusive jurisdiction of the equity courts. Mr. Perry, in speaking of the remedies of the *cestui que* trust, says: "Unless some legal debt has been created between the parties, or some engagement the nonperformance of which may be the subject of damages at law, a court of equity is the only tribunal to which he can have recourse for redress. An action at law for money had and received will not lie against a trustee while the trust is still open, but if a final account is settled, and a balance struck, an action may be maintained:" 2 Perry, Trusts (5th ed.), § 843. This rule has been announced and enforced in many cases, and, indeed, is elementary: *Jasper v. Hazen*, 1 N. D. 75 (44 N. W. 1018); *Johnson v. Johnson*, 120 Mass. 465; *Davis v. Coburn*, 128 Mass. 377; *Norton v. Ray*, 139 Mass. 230 (29 N. E. 662). The judgment of the court below is therefore affirmed.

AFFIRMED.

Decided 16 July, 1900.

HILTS v. HILTS.

[61 Pac. 855.]

From Union : ROBERT EAKIN, Judge.

Suit by J. M. Hilts against Rachael Hilts. From a decree for defendant the plaintiff appeals. **AFFIRMED.**

For appellant there was a brief and an oral argument by *Messrs. B. F. Wilson and J. W. Knowles.*

For respondent there was a brief and an oral argument by *Mr. J. D. Slater.*

MR. CHIEF JUSTICE BEAN delivered the opinion.

This is a suit to reform a deed. The complaint alleges that prior to December, 1898, C. W. Ladd and wife conveyed to the plaintiff a farm of one hundred and sixty acres in Union County, and certain town property in the City of La Grande, by separate deeds; that in December, 1898, plaintiff and defendant made and entered into an agreement by the terms of which plaintiff was to convey to defendant the town property, but, by mistake of the parties and the scrivener, conveyed the farm instead; that plaintiff discovered the mistake in March, 1899, and, in order to correct it and carry out the agreement, he made, executed, and delivered to her a good and sufficient deed conveying the town property, and then and there requested and demanded of her a reconveyance of the farm, which she refused and still refuses to make. The answer admits the conveyance by C. W. Ladd and wife to the plaintiff of the farm and town property, the execution by plaintiff of the deed conveying the farm to defendant, and the execution and delivery to her in March,

1899, of the deed conveying the town property, and alleges that in 1896 the plaintiff, who was then the husband of defendant, did, as her agent, and acting for her, purchase the farm, but wrongfully and without her knowledge or consent took the conveyance thereof in his own name; that such lands were purchased and paid for with the money of defendant, and should have been deeded to her; that at the time the land was conveyed to plaintiff it was mortgaged for \$1,200, which the defendant assumed and agreed to, and did afterwards, pay; that on the twenty-ninth of December, 1898, the defendant demanded of plaintiff that he convey the farm to her, together with other land standing in his name, but which actually belonged to her, and in pursuance of such demand he did make, execute, and deliver to her the deed to the farm, but failed and neglected to deed any of the other land mentioned until on or about March 18, when he deeded the town property to her. The reply put in issue the allegations of the answer, and upon the issues thus joined trial was had, resulting in favor of the defendant, from which plaintiff appeals.

The questions involved in this case are purely questions of fact. The evidence shows that at the time of the marriage of the parties hereto, some time prior to 1896, the plaintiff was without property or means, but the defendant owned considerable property; that, subsequent to the marriage, plaintiff looked after, and to some extent managed, his wife's property, and the proceeds therefrom and all moneys received by her were deposited in the bank to the joint account of both, or at least were subject to check by either; that the purchase price of the farm in controversy was \$100 in cash, some mules valued at \$300, and an agreement to discharge a mortgage thereon of \$1,200; that the \$100 in cash was paid from the defendant's funds, and a joint note of plaintiff and defendant

given for the purchase price of the mules ; that after the purchase of the farm the income thereof was deposited in the bank to the joint account of the parties, and the note given for the mules was paid by draft thereon. The mortgage was paid by defendant after the commencement of this suit. So it quite clearly appears that, although the deed to the farm was taken in plaintiff's name, it was paid for by, and in fact belonged to, defendant, so that when plaintiff made the deed of December, 1898, he was simply conveying to defendant what already belonged to her. Some questions of law are discussed in the briefs, but, in the view we have taken of the testimony, they are wholly immaterial and require no consideration. It follows that the decree of the court below must be affirmed, and it is so ordered.

AFFIRMED.

Decided 16 July, rehearing denied 22 October, 1900.

BAER v. BALLINGALL.

[61 Pac. 852.]

SUBROGATION ON PAYING DEBT.

1. A minor having signed a note and mortgage with his mother, and having paid the debt after he became of age, and taken an assignment of the security, is entitled to be subrogated to his mother's rights and enforce the security.

RIGHT OF DOWER NOT AN INTEREST IN REALTY.

2. In the absence of a statutory provision, an unassigned right of dower is not such an interest in real property as can be reached by an execution.

POWER OF EQUITY TO ADMEASURE DOWER.

3. The jurisdiction of equity to act concurrently with courts of law in admeasuring dower in legal estates is now firmly fixed.

ASSIGNING DOWER—STATUTORY CONSTRUCTION.

4. Section 2961 of Hill's Ann. Laws, investing county courts with power to admeasure dower, does not deprive equity courts of their long-established jurisdiction over that subject, since there are no words indicating such an intention: *Fleischner v. Citizens' Investment Co.* 25 Or. 119, applied.

ASSIGNABILITY AND LIABILITY OF UNADMEASURED DOWER.

5. A right of dower may be assigned after it has become vested, and will be liable in equity for the debts of the wife.

PRACTICE IN SELLING DOWER RIGHT.

6. Where a widow's dower estate is decreed to be subject to the payment of her debts, it should be admeasured and assigned before being sold under execution, since the uncertainty existing before assignment would greatly affect the price obtainable at such sale.

From Baker: ROBERT EAKIN, Judge.

This is a suit by S. L. Baer against Ada J. Ballingall and others to subject an unassigned dower interest in real property to the payment of a judgment rendered against the dowress. The transcript shows that one Lewis Hart died intestate about August, 1888, seised of certain real property in Baker County, Oregon, leaving surviving him the defendants Ada J., his widow, and Seth, Lotta, Jesse, and Rosa Hart (now Rosa York), his children and heirs. Frank Clark was appointed administrator of his estate, which he settled without selling any of the real property thereof. Mrs. Hart thereafter married R. F. Ballingall, but remained with her children upon said real property, her dower interest therein never having been assigned or admeasured; and, being indebted to Rosa E. Robinson and Davis Wilcox in the sums of \$700 and \$300, respectively, she executed a deed purporting to convey said dower right to them, under an agreement that if her son Seth, who was a minor, should, upon becoming twenty-one years old, convey to them two hundred acres of land which he owned in his own right, they would convey said dower interest to him, and, he having done so, they executed to him a quitclaim deed thereof. Prior to January 21, 1898, the plaintiff and S. Ottenheimer were partners. On that day the latter died intestate, and plaintiff, having been appointed administrator of the partnership estate, recovered a judgment against Mrs. Ballingall March 16, 1898, for the sum of \$247.80, which was entered on that day in the judgment docket of said county, and an execution, having been issued thereon, was returned *nulla bona*, whereupon this suit was instituted, the plaintiff alleging that Mrs. Ballingall's deed was intended by the parties

thereto as a mortgage to secure the payment of a sum unknown to the plaintiff, which had been fully paid, but, for the purpose of hindering, delaying and defrauding her creditors, she caused a deed of her dower interest to be executed to her son, and praying that said deeds be decreed mortgages and canceled, and that commissioners be appointed to admeasure her dower in said real property, and that the same be sold to satisfy plaintiff's judgment. At the trial the complaint was amended by adding a statement thereto that the deed executed by Mrs. Robinson and Mr. Wilcox to Seth Hart was in effect a satisfaction of Mrs. Ballingall's mortgage, of which plaintiff had no notice or knowledge until said deed was filed for record, prior to which his judgment had been secured in good faith, and was a lien on said dower interest. The answer admits that Mrs. Ballingall's deed was intended to secure the sum of \$1,000, which was paid by Seth Hart, whereupon the dower interest was conveyed to him in pursuance of the original agreement of the parties, in payment of that sum, as the value of the land so conveyed by him. The reply having put in issue the allegations of new matter in the answer, a trial was had, resulting in a decree dismissing the suit, and plaintiff appeals.

REVERSED.

For appellant there was a brief and an oral argument by *Messrs. J. B. Messick and Wm. H. Packwood, Jr.*

For respondents there was a brief and an oral argument by *Mr. Clarence Cole.*

MR. JUSTICE MOORE, after stating the facts, delivered the opinion of the court.

The decree is predicated upon the theory that Mrs. Ballingall's deed of her dower right was intended as a mortgage to secure the payment of the sum of \$1,000 which she owed Rosa E. Robinson and Davis Wilcox, and that such interest was conveyed to them in trust for Seth Hart, to whom it was to be conveyed when he became twenty-one years old, upon executing to them, in payment thereof, a deed for two hundred acres of land, the title to which he secured from his grandfather. The answer does not allege that Mrs. Ballingall's deed was intended by her as a conveyance of her dower interest in trust for her son, and, if it had been so averred, we think the testimony was insufficient to warrant a finding to that effect. Seth Hart, in testifying with respect to the agreement entered into with his mother concerning the conveyance of her dower interest and his payment of her debts, was asked the following question: "What was the occasion of making that agreement?" and said: "The occasion was that I wanted to be secure for paying this debt." "Q. Isn't it a fact that your mother secured the payment of these debts by giving her deed to her dower interest in the land described? A. She secured me so I would sign my deed. Q. Then, in other words, you were paying her debts? A. Yes, sir. Q. What was the consideration,—what were you paying her debts for? What advantage did you get out of it? A. The advantage was, I would be secured for paying her debts." We think this testimony clearly shows that Mrs. Ballingall and her son intended that, when he paid her debts to Mrs. Robinson and Mr. Wilcox, their deed, which was in fact a mortgage, should be assigned to him as security therefor.

1. It is argued by plaintiff's counsel that Seth Hart

was jointly liable with his mother to Mrs. Robinson and to Mr. Wilcox, and that when he paid their demands, and secured a conveyance of said dower interest, the mortgage was thereby satisfied. Mrs. Robinson's demand was evidenced by a promissory note executed by Mr. and Mrs. Ballingall, and assigned to her; and notwithstanding Seth Hart, when he agreed to pay his mother's debt, about December 18, 1896, was only nineteen years old, which fact was well known to all the parties, he, to signify his willingness to keep his engagements, appended his name to said note, and also executed to Mrs. Robinson and Mr. Wilcox a deed purporting to convey the two hundred acres of land of which he was seised, in pursuance of which the grantees therein immediately took, and thereafter continuously held, possession thereof. His signature affixed to his mother's note was only an evidence of his good faith that he would pay Mrs. Robinson the amount due thereon and take an assignment thereof. This was the consideration for his signature, and, having satisfied his agreement by executing a confirmatory deed after he became twenty-one years old, he was entitled to be subrogated to the rights of Mrs. Robinson, and to hold the note and security which his mother had given her. The claim of Davis Wilcox was founded on an account for groceries and supplies sold to Mrs. Ballingall, and used by her in supporting her family, for which her son Seth, then a minor, was not liable, but, having paid for them after attaining his majority, he is entitled to hold the security which his mother gave Wilcox therefor. Believing, as we do, that the conveyance of the dower interest was intended as a security for the sum of \$1,000 when held by Seth Hart, and that Mrs. Ballingall had an equity of redemption in the premises which, in equity, should be subject to the lien of plaintiff's judgment, the mortgage given by her, and equitably assigned to her

said son, will be foreclosed, and he will be entitled to receive, upon a sale of her dower right therein, the sum of \$1,000, with interest thereon from December 18, 1896, the time when Mrs. Robinson and Mr. Wilcox took possession of his land under the original deed thereof. The complaint having alleged that Mrs. Ballingall occupied all the land subject to her dower, her son Seth is not chargeable with any rent arising therefrom.

2. This brings us to a consideration of the mode of enforcing the decree. The rule is well settled that, unless otherwise regulated by statute, a mere right of dower before an assignment thereof to the dowress is only a chose in action, and not such an interest or estate in real property as can be levied upon and sold under an execution against her property: 4 Kent, Comm. *61; 1 Washburn, Real Prop. *251; *Leonard v. Grant*, 8 Or. 276; *Rayner v. Lee*, 20 Mich. 384; *Nason v. Allen*, 5 Me. (5 Greenl.) 479; *Blain v. Harrison*, 11 Ill. 384; *Summers v. Babb*, 13 Ill. 483; *Gooch v. Atkins*, 14 Mass. 378; *Shield's Heirs v. Batts*, 5 J. J. Marsh. 12; *Waller v. Mardus*, 29 Mo. 25; *Petty v. Malier*, 15 B. Mon. 591; *Torrey v. Minor*, 1 Smedes & M. Ch. 489.

3. In *Tompkins v. Fonda*, 4 Paige, *448, a judgment having been rendered against a widow, whose only property consisted of an unassigned dower interest in a farm of which her husband died seised, and of which she was in possession with his heirs, the judgment creditor instituted a suit for the appointment of a receiver to assign her dower, and the relief prayed for was granted. Mr. Chancellor WALWORTH, in speaking of the widow's retaining possession of the premises subject to her dower, without demanding an assignment thereof, thus defeating the enforcement of a judgment, said: "She has no right, therefore, in conscience or in equity, to deprive her creditors of the benefit of her right of dower for the

satisfaction of their debts, by continuing in possession with the heirs, and neglecting to ask for a formal assignment, which assignment, and entry under it, would enable the creditors to reach it by execution. The right of dower of the defendant in this case is such an interest as may be reached by the aid of this court, and applied to the satisfaction of the complainant's judgment." At common law, the heir or tenant of the freehold possessed the power, and it was his duty, to assign the widow's dower, but, if he neglected or refused to do so within the period of quarantine, she could maintain an action at law against him to determine her right, and to recover damages for withholding her dower; and, if she recovered judgment therein, a writ of seisin was issue thereon, in pursuance of which the sheriff, after notifying the adverse parties, admeasured her dower by metes and bounds: 7 Enc. Pl. & Prac. 169. In the reign of Elizabeth, however, courts of equity began to assume jurisdiction in aid of the common law courts in enforcing rights of dower: Pomeroy, Eq. Jur. § 1380; 2 Scribner, Dower (2 ed.), 145. The auxiliary jurisdiction thus originally undertaken has expanded until it is now the general rule in the United States that courts of equity exercise concurrent jurisdiction with courts of law in admeasuring dower in legal estates: 10 Am. & Eng. Enc. Law (2 ed.), 173; 1 Story, Eq. Jur. § 624; *Brooks v. Woods*, 40 Ala. 538; *Herbert v. Wren*, 11 U. S. (7 Cranch), 370; *Powell v. Monson & B. Mfg. Co.* 3 Mason, 347 (Fed. Cas. No. 11,356).

4. The legislative assembly has invested the county courts of this state with power to admeasure dower, when the widow's right thereto is not disputed (Hill's Ann. Laws, § 2961); but the statute conferring such authority does not in express words deprive a court of equity of its jurisdiction over the subject-matter, and,

this being so, such power remains in the court of equity unaffected by the statute (*Owen v. Slatter*, 26 Ala. 547, 62 Am. Dec. 745). In that case Mr. Chief Justice CHILTON, in speaking of the power of a court of equity to admeasure dower, notwithstanding a statute of Alabama conferring authority on the probate courts of that state to do so, says: "The rule is that, although the statute may confer jurisdiction upon another court over subject-matter of which the chancery court had jurisdiction, the jurisdiction of the latter court remains unimpaired unless, by the language of the statute, they are forbidden to proceed in such cases." See, also, upon this subject, *Phipps v. Kelly*, 12 Or. 213 (6 Pac. 707); *Fleischner v. Citizens Invest. Co.* 25 Or. 119 (35 Pac. 174).

5. In *Strong v. Clem*, 12 Ind. 37 (74 Am. Dec. 200), it was held that a widow's dower interest in the real property of her deceased husband was assignable, and that the right, under the statute of Indiana, might be enforced by the assignee in his own name. Mr. Justice PERKINS, speaking for the court in deciding the case, says: "The first question arising in this case is whether a dower interest accruing to the widow in the real estate of her deceased husband, by virtue of the marriage, is assignable; and we think it is. Upon the death of the husband, the previous inchoate right of the wife becomes consummate,—a vested right; lying, it is true, in action, but still vested. It is a right, a chose in action, arising, not out of tort, but contract. Such rights of action and such interests were assignable in equity, at common law, so as to enable the assignee to recover upon them in a suit in his own name in chancery, but not at law. The assignment transferred the equitable, not the legal, title. * * * This right of the widow, then, being equitably assignable, may be enforced, under our present code, in the name of the assignee; for, while our statute may

not have enlarged the common-law right as to equitable assignments, it has invested the equitable assignee with the right to sue in his own name, as he might formerly in chancery." So, too, in *Payne v. Becker*, 87 N. Y. 153, it is held that the dower interest which a widow has in lands of which her deceased husband had been seised, although not admeasured, is assignable as a right in action, and is liable in equity for her debts. Mr. Justice DANFORTH, in deciding the case, says: "It must now be deemed settled that, upon the death of her husband, a widow has an absolute right to dower in the lands of which he had been seised, and that this right or interest, although resting in action, is liable in equity for her debts. In the cases above cited (*Tompkins v. Fonda*, 4 Paige, *448, and *Stewart v. McMartin*, 5 Barb, 438), the action for its admeasurement was required to be brought in the widow's name, but, since the code, that cannot be necessary."

6. Mr. Justice SCOTT, in *Waller v. Mardus*, 29 Mo. 25, in speaking of the necessity of admeasuring dower before the widow's right to the premises is sold, says: "If the dower interest is permitted to be sold under execution before it is assigned, and the purchaser shall be compelled to go to law in order to have it allotted to him, the uncertainty whether it would ever be assigned would inevitably cause a diminution of price, which would not occur if the dower was assigned before the sale took place. To sell the right of dower at public auction, and then have it assigned, the purchaser taking the risk whether it will be assigned or not, would generally cause a sacrifice of it. The creditor should have the dower actually assigned before it is sold."

It is apparent, therefore, that Mrs. Ballingall's dower interest in the real property of which her former husband died seised should be assigned before it is sold, in

order that a reasonable sum may be bid therefor, and, this being so, the cause will be remanded to the court below with directions to appoint, upon notice to the adverse parties (Hill's Ann. Laws, § 331), three discreet and disinterested persons, authorizing and requiring them to set off by metes and bounds, to the use of the assignee of Ada J. Ballingall, during her natural life, one-third part of the lands described in the complaint, that being the interest to which she was entitled upon the death of her former husband (Hill's Ann. Laws, § 2954), and, having done so, that her interest in the premises so admeasured be sold under this decree, as upon execution, and from the money arising therefrom there be paid—first, the expense of such sale and the costs incurred in this court; second, the amount so decreed to the defendant Seth Hart; third, the amount of plaintiff's judgment; and, fourth, the remainder, if any, to Mrs. Ballingall. If it shall appear, however, to the satisfaction of the court, from the report of the referees or otherwise, that said dower interest cannot be set off by metes and bounds without injury to the estate and great prejudice to the owners, then to order a sale of the whole premises, and apply the money arising therefrom to the costs of such sale, and from the remainder to set off to the account of Mrs. Ballingall the value of her dower, estimated upon her life, at the time of such sale, upon the principles for ascertaining the present value of life annuities (2 Scribner, Dower [2 ed.], 171, 653, *et seq.*), and from the sum so set off to her to pay the several sums to the parties in the order hereinbefore stated; the portion of the sum realized from the sale of said real property not set apart to the account of Mrs. Ballingall, to be paid to the heirs of Lewis Hart, or to those entitled to the same. The decree will therefore be reversed, and a decree entered here as indicated.

REVERSED.

Decided 16 July, 1900.

LOMBARD v. WADE.

[61 Pac. 356.]

RECEIVERS—DISCHARGE—LACHES.

1. One of the defendants in a suit to foreclose a mortgage was injuriously affected by a decree which was entered on an erroneous mandate from the appellate court. She neglected, however, to apply to the supreme court for correction of the mandate for ten months after the receiver had been directed to distribute the rents and profits in his hands, and for eight months after confirmation of the sale under the decree. After the decree had been corrected, she applied for an order vacating the distribution of rents formerly made by the receiver and for a redistribution, and for an order directing the receiver to place her in possession. *Held*, that the motion was properly denied on the ground of her laches; the former order directing payment by the receiver having been acquiesced in by her for nearly a year, during which the receiver had distributed the funds in accordance with the order of the court, and another party had taken peaceable possession.

INFORMAL ORDER DISCHARGING RECEIVER.

2. Where an order was made in a foreclosure suit confirming the receiver's report, and directing him to make certain payments of the funds in his hands, taking vouchers therefor, and that on filing such vouchers he be discharged, and the receiver made such payments, except to one party, who refused to accept her share, and, with the acquiescence of all parties, ceased to collect rents from the premises or to exercise any control over them, such order, though informal, will operate as a discharge of the receiver.

NUNC PRO TUNC ORDER—POWER OF COURT.

3. A court cannot make an order that it ought to have previously made, or correct an improper or irregular order, and enter it *nunc pro tunc*, as of an earlier date.

From Umatilla: STEPHEN A. LOWELL, Judge.

This is a dispute between Letitia Lombard and C. B. Wade, who was receiver in the case of *Conklin v. La Dow*, reported in 33 Or. 354 (54 Pac. 218). The facts are fully stated in the opinion in that case.

For a proper understanding of the questions now before the court, it is only necessary to add that, after the termination of the proceedings in the probate court and the execution of the mortgage to the plaintiff's assignor, the defendant Mrs. Lombard purchased a portion of the mortgaged premises, known as "No. 301 Court Street, Pendleton, Oregon," from the successors in interest of Frank

E. La Dow and Charles B. Isaac, and was in possession thereof at the time of the commencement of the suit, and so remained until the tenth of February, 1897, when, upon the application of the plaintiff and over the objection of the defendants, C. B. Wade was appointed receiver of the mortgaged property. Thereafter the suit was tried upon the issues presented by the separate answers of Lewis McArthur La Dow and Mrs. Lombard, and a decree rendered declaring plaintiff's mortgage void as to the undivided half of the property inherited by the defendant Lewis McArthur La Dow. But, notwithstanding the fact that Mrs. Lombard claimed to have succeeded to the interest of Lewis McArthur La Dow in 301 Court Street by purchase, made presumedly on the faith of the regularity of the proceedings in the probate court, and that no issue was made or could have been made for trial between her and her codefendant as to the validity of her title, the court decreed that Lewis McArthur La Dow was the owner in fee of an undivided half of the mortgaged premises, which included, of course, the undivided half of 301 Court Street claimed by her. Upon appeal the decree of the court below was affirmed, except as to the part thereof decreeing Lewis McArthur La Dow to be such owner. By mistake, however, the entry of the decree of this court showed that the decree from which the appeal was taken was in all things affirmed, and, upon receipt of the mandate issued thereon, a decree of the circuit court was entered September 1, 1898, in accordance with its provisions, decreeing that Lewis McArthur La Dow was the owner in fee of an undivided half of the entire mortgaged property. On September 20, 1898, the final report of the receiver was examined and approved, and it was thereupon decreed that he pay to S. L. Conklin the sum of \$532.70, to Lewis McArthur La Dow \$296.90, and to Mrs. Lombard \$61.09, and "that he take vouchers therefor, and that upon the

filing of such vouchers the said receiver be discharged without further order of this court."

On November 5, 1898, the undivided half of the property described in the mortgage, formerly belonging to Frank E. La Dow, was sold under the decree of foreclosure to S. L. Conklin, and the sale was confirmed on the nineteenth of the month. Nothing further was done by Mrs. Lombard in the matter until the nineteenth of July, 1899, when she applied to this court for an order recalling the mandate, so that its decree might be made to conform to the opinion and actual decision of the court. This motion was allowed, and upon the return of the mandate the court on the second of January, 1900, made an order correcting the decree accordingly; and, a mandate issued on the amended decree having been filed in the court below on the sixteenth of the month, a decree was there entered in accordance therewith. On February 5 and 24 Mrs. Lombard filed motions in the court below to vacate the order of distribution of September 20, 1898, and for an order redistributing the net profits in the receiver's hands, and also for an order requiring him and the defendant Lewis McArthur La Dow to pay her all the rents and profits of the premises 301 Court Street up to the time of the sheriff's sale hereinbefore referred to, and of an undivided half thereof since such sale, less the proportion thereof due on the dower right of Mattie A. La Dow. Upon the hearing of these motions, after notice to all the parties, the court, on March 3, made the following order: "It appearing to the court that the receiver has long since been, to all intents and purposes, discharged, and that such money as may be due to said Letitia Lombard is not in the hands of such receiver, except that portion allotted to her by the court, and which she refused to accept, to wit, \$61.09, and it also appearing that, under the decision of the supreme court last handed

down, the court did err in said distribution order, it is hereby ordered that plaintiff S. L. Conklin and defendant Lewis McArthur La Dow, the parties overpaid in such distribution, do pay to said Letitia Lombard such sum as shall make such distribution equitable to the date of such distribution, to wit, said Conklin \$46.71, and said La Dow \$53.85, making total distributive portion going to said Letitia Lombard \$161.65. And it also appearing that said petition also asks that said Conklin and La Dow do account for rents and profits of the premises herein involved during such time as they have been in possession since said distribution, and that the court place said Lombard in possession of that portion of said premises claimed by her, and upon that prayer it appearing that the receiver, under order of this court, upon the first opinion of the supreme court herein, as it then understood the same, and upon entering judgment on the mandate, surrendered all of said property on the twentieth day of September, 1898, and has since had nothing to do with it in any manner whatsoever, and that at that time the said receiver distributed the funds in his hands according to the order of this court so far as he was able to do so, and was in all things discharged upon filing vouchers (which he was unable to do because of the refusal of said Letitia Lombard to accept and receipt for the proportion directed to be paid to her), and that, therefore, since said entry of judgment on the mandate, this court has had no possession of or jurisdiction over any part of said property, it is ordered that the petition asking accounting and possession be and the same is denied, and said Letitia Lombard directed to proceed in the usual manner for an accounting between joint tenants."

On the twentieth of March Mrs. Lombard served a notice of appeal from the order of March 3, 1900, upon the attorney for plaintiff, and on the twenty-fourth of

the month on the receiver and the attorney for Lewis McArthur La Dow. Upon the twenty-second of March the court below, apparently upon its own motion, and without notice to or upon the application of any of the parties to the suit, directed an order to be entered "*nunc pro tunc* as of the twentieth of September, 1898," of which the following is a copy: "Now, on this day, it appearing that mandate of the supreme court herein has been filed, and judgment and decree taken and entered thereon, and therefrom it further appearing that the decree of this court in this cause is in all things confirmed and affirmed, and that therefore such decree is final, and it also appearing that under said decree the premises herein involved have been sold as by statute in such cases provided, and that there are no further duties for the receiver therein, Charles B. Wade, to perform, it is ordered that said receiver do forthwith surrender possession of all property herein involved, and in pleadings described, to plaintiff S. L. Conklin, the purchaser at said sale, and Lewis McArthur La Dow, defendant, who is declared by said decree to be the owner of one undivided half interest, subject to widow's dower, in all of said property."

REVERSED.

For appellant there was a brief over the names of *Raleigh Stott* and *Benjamin M. Lombard*, with an oral argument by *Mr. Stott*.

For respondent there was a brief over the names of *John J. Balleray* and *Carter & Raley*, with an oral argument by *Mr. Balleray* and *Mr. Chas. H. Carter*.

MR. CHIEF JUSTICE BEAN, after making the foregoing statement of the facts, delivered the opinion.

1. The motion of Mrs. Lombard, made in February, 1900, for an order of redistribution of the funds collected by the receiver, and for the delivery to her of the undivided half of 301 Court Street, was properly denied on account of her laches, if for no other reason. The original order of distribution and for the discharge of the receiver was made in September, 1898, at which time the receiver's accounts were examined, settled and approved. At that time no request was made of the court, so far as the record discloses, for an order directing the receiver to turn over the property to any one. No appeal has been taken from such order, nor was any objection made thereto by Mrs. Lombard until almost a year later, when the petition was filed in this court for an order recalling the mandate. It seems to us that under these circumstances she is not now in a position to insist that the order of September 20, 1898, be modified or disturbed. It was made in obedience to the mandate of this court, without objection by any of the parties, so far as we are advised; and the fund has been distributed in accordance therewith, except the amount apportioned to the defendant Lombard. It would, no doubt, have been proper for the court, at the time it made the order discharging the receiver, to have directed him to deliver possession of the property to the party entitled to it; but no objection was made on account of its failure to do so, either to the court below or by appeal, and it is now too late to question the validity of such order.

2. It is argued that it did not operate to discharge the receiver, because it was conditioned upon his subsequently filing receipts from the distributees, which he was unable to do, because Mrs. Lombard refused to re-

ceive and receipt for the portion directed to be paid to her. But, with the acquiescence of all the parties, the receiver ceased to exercise any control over the property and ceased to collect the rents and profits thereof, so that, while the order may in some sense be informal, yet its effect was to discharge the receiver and exonerate him from any further liability as such; and if Lewis McArthur La Dow wrongfully obtained possession of the property, as Mrs. Lombard claims, it was due largely to her own negligence.

3. The alleged *nunc pro tunc* order of March 22 is, however, clearly void, and cannot affect the rights of the parties in any way. There is no finding that such an order was in fact made on September 20, 1898, and that the entry thereof was inadvertently omitted by the clerk; but it seems to be an order made on the twenty-second of March, 1900, which the court directs to take effect as of the twentieth of September, 1898, and, clearly, the court had no power or authority to make any such an order. It was apparently an attempt to amend the order of September 20. And Mr. Black says: "The power of courts to order the entry of judgments *nunc pro tunc* is not to be used for the purpose of correcting errors, omissions or mistakes of the court. It cannot direct a proper judgment to be thus entered, when the fault is that the first judgment is one which should not have been entered in the case, or is imperfect or improper. * * * Hence the court cannot at a subsequent term change its judgment to one which it neither rendered nor intended to render, nor supply an order which it might or ought to have made, but wholly omitted to make." 1 Black, Judgm. § 132. The order of March 3, 1900, will therefore be affirmed, but the *nunc pro tunc* order of March 22 will be vacated and held for naught. This conclusion, however, will be without prejudice to any further pro-

ceedings by Mrs. Lombard for an accounting, or to assert her claim to the property in controversy; and neither party will recover costs on the appeal. REVERSED.

Decided 23 July, rehearing denied 15 August, 1900.

BREDDING v. WILLIAMS.

[61 Pac. 853.]

LAW GOVERNING SCHOOL ELECTIONS—DUTY OF JUDGES.

School elections are not governed by the provisions of the general election law—and if a qualified elector is challenged, the judge is not under any obligation to determine his right to vote as would be required at a general or special election.

From Umatilla: STEPHEN A. LOWELL, Judge.

• Election contest by Christ Bredding against James Williams to determine which one of them had been elected as school director. There was a judgment of dismissal, and plaintiff appeals. AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. S. A. Newberry*.

For respondent there was a brief over the names of *John J. Balleray* and *Thos. G. Hailey*, with an oral argument by *Mr. Balleray*.

MR. JUSTICE MOORE delivered the opinion of the court.

This is a proceeding to contest the alleged election of the defendant to the office of school director of School District No. 69, Umatilla County, Oregon. It is averred, in effect, that at the annual meeting of said district held March 1, 1897, the plaintiff and defendant were qualified electors of said district, and candidates for said office, receiving six and nine votes therefor, respectively, whereupon the latter was declared duly elected; that eight

other qualified electors of said district, whose names are given in the notice of contest, tendered to the judges of said election their ballots in writing, expressing their choice of plaintiff for said office, but the judges unlawfully refused to receive them, or any of them, though the electors were ready and willing to take the necessary oath respecting their qualifications; and that, if they had been permitted to vote, plaintiff would have received a majority of all the votes cast. The answer, having denied the material allegations of the notice of contest, averred that neither of the persons so named therein was an elector of said school district, stating wherein each was disqualified. The reply having put in issue the allegations of new matter in the answer, a trial was had, without the intervention of a jury, resulting in a judgment dismissing the proceedings, whereupon plaintiff appealed, and, it appearing that the court below failed to make the necessary findings of fact, the judgment was reversed on such appeal, and a new trial ordered: *Breding v. Williams*, 33 Or. 391 (54 Pac. 206). The cause having been remanded, the court, in pursuance of the stipulation of the parties, made its findings from the testimony theretofore taken, and, having again dismissed the proceedings, plaintiff appeals.

The court found, in effect, that there were at said school meeting twenty-two qualified electors, six of whom cast their ballots for the plaintiff and nine for the defendant; that G. Eichner and G. Seivers were legal voters, and in favor of the election of plaintiff, but, being under the impression that they would be required to swear that they were citizens of the United States, and not having fully completed their naturalization, neither of them offered to vote; that J. Richmond, D. Richmond, H. Fanning, C. Thornton, and Mrs. J. Dand, qualified electors, tendered their respective ballots to the judges of the

election, but, having been severally challenged, neither of them insisted upon voting, or offered to be sworn respecting his qualification, whereupon said ballots were rejected, but, if they had voted, each would have cast his ballot for plaintiff; that there was a general and honest misunderstanding and lack of knowledge on the part of the directors and electors present at the annual meeting respecting the qualifications of the latter, and in case of doubt upon that subject a challenge was interposed, but that each of the persons whose ballots were rejected had the privilege of making oath to his qualifications, but neglected to do so, because he did not know whether, under the law, he was entitled to vote.

The election having been held prior to the amendment of Section 2609*, Hill's Ann. Laws (Laws, 1898, p. 22*), it is contended by plaintiff's counsel that, the electors having been challenged as disqualified, it forthwith became incumbent upon the chairman of the school meeting to administer to each an oath that he would truly answer all questions propounded to him touching his place of residence and qualifications as an elector at said meeting, and upon taking which to interrogate him respecting his citizenship in this state, his age, residence in the district immediately preceding the meeting, and whether he had property in the district upon which he paid a tax, or, if he had no property therein, whether he had children of school age to educate; and if, after answering such questions, the challenge was not withdrawn, to administer to each elector an oath in substance as follows: "You do solemnly swear (or affirm) that you are a citizen of this state; that you are twenty-one years old; that you have resided in this school district thirty days immediately preceding this meeting; that you have property in the district upon which you pay a tax; or (if the elector have no taxable property therein) that you

have children of school age to educate." But the chairman having failed to perform his duty in these particulars, and the court having found that said electors were duly qualified, and that, if they had voted, they would have cast their ballots for the plaintiff, whereby he would have received a majority of all the votes cast, it erred in not directing that a certificate of election be issued to him, and in dismissing the proceedings. This contention is based upon the method of determining the qualifications of electors at general elections, as prescribed by Section 11 *et seq.*, Title I, Chapter XIV, of the general election laws of the state (2 Hill's Ann. Laws [ed. 1892], p. 1169, being Laws, 1891, p. 11, § 11), which provides that it shall be the duty of any elector to challenge any person offering to vote whom he shall know or suspect is not qualified, whereupon the chairman of the judges of election shall administer to the person so challenged a *voir dire* oath, and propound such interrogatories as may be necessary to test his qualification, and if he refuse to answer fully any question concerning his qualification as an elector his vote shall be rejected; and after such examination, if such challenge is not withdrawn, to administer to him a final oath, the form of which is prescribed. It will thus be seen that when a challenge is interposed to an elector at a general election the duty of determining his qualification devolves upon the chairman of the judges, who, it would seem, must take active measures, and immediately try the issue raised by the challenge.

An examination of the statute to which attention has been called will disclose that the method prescribed therein applies only to general and special elections held in the several election precincts of the state: Laws, 1891, §§ 1, 9, 10. The general elections are held on the first Monday in June, 1892, and biennially thereafter (Const. Or. Art. II, § 14; 2 Hill's Ann. Laws, p. 1172), and on

the Tuesday next after the first Monday in November in every fourth year succeeding every election of the President and Vice President of the United States (Rev. St. U. S. § 131); while special elections to fill vacancies in the legislative assembly or in the office of representatives in congress are held at such times as the Governor, by his writ authorizing the same, may appoint (Const. Or. Art. V, § 17; Hill's Ann. Laws, § 2556). But annual meetings for the election of school officers in all organized districts containing less than five hundred qualified voters are held on the first Monday in March, while in school districts containing five hundred or more qualified voters such election is held on the second Monday in that month (Hill's Ann. Laws, § 2599), thus showing that school elections are not general, and, not being held in pursuance of the Governor's writ, they are not special; hence the rule invoked does not apply to the question involved. Thus, in *State v. Mahaey*, 19 Mo. App. 210, it was held that the chairman of a meeting of the qualified voters of a school district was not subject to the pains and penalties inflicted by the criminal law for rejecting the vote of an applicant for suffrage. So, too, in *Marion v. Territory*, 1 Okl. 210 (32 Pac. 116), it was held that the provisions of the general election law, known as the "Australian System," was not applicable to an election held in pursuance of the provisions of the school laws of Oklahoma Territory, to determine whether separate schools should be established for colored people. In *Kreitz v. Behrensmeyer*, 125 Ill. 141 (17 N. E. 232, 8 Am. St. Rep. 349), it was held that the voter who knows that his ballot was not accepted must insist upon his rights, and furnish the evidence required by the statute, to entitle his vote to be received. In *Blanchard v. Stearns*, 5 Metc. (Mass.) 298, it was held that, to enable a qualified elector to maintain an action against the selectmen for refusing to receive

his vote or for omitting to put his name on the list of voters, he must allege and prove that he furnished them sufficient evidence of his having the legal qualifications of a voter, and requested them to insert his name on the list of voters, before they refused to receive his vote or omitted to insert his name on such list. To the same effect, see *Lombard v. Oliver*, 7 Allen, 155.

In the absence of a statute the duty devolves upon the elector whose vote is challenged to produce the necessary evidence to establish his right of suffrage, if he insists upon its exercise. The legislative assembly has made no special provision respecting the determination of the qualification of electors at school meetings, and, the statute relating to general elections being inapplicable thereto, the judges of the election at said meeting could not be placed in default, so as to authorize the votes of these electors to be counted for the person of their choice, until they had done or offered to do all things necessary to prove their qualifications; but, said electors having failed to make or offer any proof, no error was committed in dismissing the proceedings: *Darragh v. Bird*, 3 Or. 229. There are other alleged errors assigned, but they are not argued in appellant's brief, and, deeming them unimportant, the judgment is affirmed. AFFIRMED.

Decided 23 July; rehearing denied 15 August, 1900.

SWANK v. SWANK.

[61 Pac. 846.]

DELIVERY OF DEED.

1. The delivery of a deed is consummated when the control of it passes beyond recall with the consent of the grantor: *Allen v. Ayer*, 26 Or. 569, and *Payne v. Hallgarth*, 33 Or. 430, cited.

DEED—PRESUMPTION FROM POSSESSION.

2. The possession of a properly executed deed by the grantee creates a disputable presumption of delivery: *Flint v. Phipps*, 16 Or. 437, approved.

DELIVERY OF DEED THROUGH AGENT.

3. The giving of a deed by the grantor, after signature and acknowledgment, to one employed by the grantee to prepare it and take the acknowledgment, without direction regarding its custody or disposition, constituted a sufficient delivery thereof, though not given to the grantee till after the grantor's death, since such employment by the grantee constituted the person employed his agent, and delivery to such agent was delivery to the principal.

DEED—EVIDENCE OF MENTAL CAPACITY.

4. Evidence that a grantor's physician on the day a deed was executed considered his mind remarkably clear for one who had suffered so long, and a clergyman who visited and talked with him frequently prior to that day and afterward until his death thought him always perfectly rational, and that such grantor's wife signed the deed at his request while she was feeling as well as usual, in order to stop his worrying, shows mental capacity and knowledge of the transaction in hand, rendering such parties competent to execute the deed, though for over two months prior to its execution such grantor had suffered much pain, to relieve which morphine had been frequently administered, and his wife was much exhausted by watching and nursing him: *In re Cline's Will*, 24 Or. 175, and *Carnegie v. Diven*, 31 Or. 366, applied.

PLEADING AND PROOF MUST CORRESPOND.

5. Recoveries in legal proceedings must be had, if at all, on the grounds stated in the pleadings; a party will not be permitted to recover on a claim or theory that has not been pleaded. Thus, where neither the complaint nor the answer alleged an intention of the parties that a deed and bill of sale sought to be set aside and canceled should be considered as mortgages, but the complaint was predicated on the theory of mental incapacity to execute and failure to deliver the deed, a recovery cannot be claimed on the mortgage theory.

From Linn: HENRY H. HEWITT, Judge.

This is a suit by Mary E. Swank, individually and as administratrix of J. R. Swank, deceased, and others, against Phillip Swank, to remove an alleged cloud from the title to real property, to set aside a deed thereto, and to cancel a bill of sale of personal property. The facts

37	439
40	504
37	439
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48	466
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are that on November 21, 1897, Jay R. Swank was accidentally wounded by a gunshot, and on February 3, 1898, having been informed by his physician that he would probably not survive the injury, and advised that if he had any business that needed settlement he ought to give it attention, he on the next day signed a bill of sale, and, with his wife, the plaintiff Mary E. Swank, signed, sealed and acknowledged a deed purporting to transfer and convey to his father, the defendant, Phillip Swank, all the real and personal property of which he was seised or possessed. Jay R. Swank having died intestate February 8, 1898, his widow was appointed administratrix of his estate; and, having duly qualified and entered upon the discharge of her trust, the following claims against said estate were presented to and allowed by her, to wit: Dr. J. P. Wallace, \$137; W. E. Chandler, \$465; Dr. J. A. Lamberson, \$535; Mayer Brothers, \$11.50; Hiram Baker, \$37.53; Dalglish & Everett, \$35.90; and A. Tenney, \$195.

The administratrix, having no means of paying any part of these claims, obtained from the County Court of Linn County an order in pursuance of which she, individually and as administratrix of the estate and guardian *ad litem* of the minor heirs, instituted this suit, alleging, in substance, that J. R. Swank died seised and possessed of said real and personal property, which is of the probable value of \$4,000; that at the time of his death he was indebted in about the sum of \$6,500, and that the funeral expenses and costs of administration had not been paid; that at and prior to the time said deed and bill of sale were signed her husband was sick, and she was exhausted from sitting up with and nursing him, in consequence of which they were weak in body and mind; that defendant, without any consideration therefor, prevailed on Jay R. Swank to sign a bill of sale, and induced him and

plaintiff to sign, seal, and acknowledge a deed purporting to transfer and convey to him all the real and personal property of which her husband was seised or possessed ; that said pretended deed and bill of sale were never delivered, but were left in the possession of one S. M. Garland, of Lebanon, Oregon, who retained them until after Jay R. Swank's death, when the defendant got possession of them, and without authority caused the deed to be recorded ; that the pretense upon which the signatures to said deed and bill of sale were so procured was that in case of Jay R. Swank's death, and not until then, said instruments were to be delivered to the defendant, who would thereupon claim title thereunder and take possession of the property, pay the debts of his said son, and distribute the proceeds of his estate according to the law of descent ; that since the death of Jay R. Swank defendant has secured the possession of one thousand four hundred bushels of wheat, the property of said estate, of the value of \$1,000, and threatens to take possession of all other property belonging thereto, and to retain the same as his own, refusing to pay the debts of his said son or to make any other disposition of the property of his estate for the benefit thereof, claiming title to the said real estate under said deed, which claim is a cloud upon plaintiff's title thereto. The defendant denies the material allegations of the complaint, and avers in substance that said deed and bill of sale were executed in payment of the sum of \$100 which his son owed him, and in consideration of his agreement to pay the sum of \$3,196 to Jacob Kees, evidenced by a promissory note executed by Jay R. Swank as principal and himself as surety, and also to pay P. Kester and the Board of School Land Commissioners the sums of \$324 and \$2,240 due each, respectively, from his said son ; that the value of the property so transferred and conveyed does not exceed the sum of

\$4,775, while the amount assumed and agreed to be paid therefor is \$5,860; that defendant, upon the execution of said conveyance and bill of sale, took immediate possession of the property, and in pursuance of his agreement has paid Jacob Kees on account of said note the amount demanded, and has also paid the interest on the other debts, the payment of which he had assumed. The allegations of new matter in the answer having been denied in the reply, a trial was had, resulting in a decree dismissing the suit, and plaintiff appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. H. C. Watson*.

For respondent there was a brief over the name of *Weatherford & Wyatt*, with an oral argument by *Mr. Jas. K. Weatherford*.

MR. JUSTICE MOORE, after stating the facts, delivered the opinion of the court.

1. It is contended by plaintiff's counsel that the testimony shows that it was the intention of the parties that the deed and bill of sale should not be delivered except in case of Jay R. Swank's death, thus evidencing his purpose to retain control of the deed, but that the defendant, without any authority therefor, secured its possession and caused it to be recorded, thereby casting a cloud upon the title to the premises, and hence the court erred in dismissing the suit. The delivery of a deed is a prerequisite to its validity, and, while no particular formalities are essential to constitute such delivery, it is necessary that the grantor should expressly or impliedly consent that the deed should irrevocably pass from his control: *Fain v. Smith*, 14 Or. 82 (58 Am. Rep. 281, 12 Pac. 365); *Shirley*

v. *Burch*, 16 Or. 83 (8 Am. St. Rep. 273, 18 Pac. 351); *Allen v. Ayer*, 26 Or. 589 (39 Pac. 1); *Hoffmire v. Martin*, 29 Or. 240 (45 Pac. 754); *Payne v. Hallgarth*, 33 Or. 430 (54 Pac. 162).

2. A properly executed deed, when found to be in the possession of the grantee, creates a disputable presumption that it was delivered to him, and the grantor or his privies who controvert such presumption assume the burden of showing that it was not delivered: 1 Devlin, *Deeds*, § 294; *Flint v. Phipps*, 16 Or. 437 (19 Pac. 543).

3. The testimony shows that S. M. Garland, at defendant's request, went to the house in which Jay R. Swank was staying and took his acknowledgment and that of his wife to the deed, which he took to his office and impressed his notarial seal thereon. Garland, having been called as a witness for plaintiffs, testified in his cross-examination in relation to the deed and bill of sale as follows: "Q. You say you took the papers and laid them away, did you? A. Yes, sir. Q. At Jay's suggestion? A. No, sir. Nobody suggested it. Q. Where did you put them? A. I put them in my office, in the place where I generally kept deeds. Q. You took the papers over to your office for the purpose of putting your seal on them, now, didn't you? A. I took them for the purpose of keeping them safe in case Jay wished to recall them. Q. Did Jay direct you to do that? A. No, sir." On further cross-examination the witness, in answer to the question, "Did some one request you to hold these papers, and, if so, who?" said, "I don't remember, but it seems to me something was said about that by Mr. Perry, but I won't be sure." The person to whom the witness referred is the plaintiff's brother, who is undoubtedly interested in her welfare; but, not being a party to the deed, any suggestions or directions by him to Garland respecting the instruments which the latter had in his possession

were unavailing. While the testimony shows that Garland did not give the deed to the defendant until after Jay R. Swank's death, we think the instrument was delivered at the time it was signed, sealed, and acknowledged, and that Garland took the deed to his office to attach his seal thereto, and not to hold it subject to the will of the grantors; for, having been engaged by the defendant to prepare the deed and to take the grantor's acknowledgment, he was the defendant's agent, so that a delivery to him was in effect a delivery to his principal.

4. It is contended that the court erred in finding, in effect, that Jay R. Swank and his wife possessed sufficient mental capacity to execute the deed in question. The testimony shows that he suffered much pain from the effects of his wound, and to relieve his distress his physician frequently administered morphine, but we do not think the pain he endured or the remedy resorted to for its alleviation affected his mind to such an extent as to incapacitate him from entering into a contract; for his physician, Dr. J. A. Lamberson, admits that he told a person on the day the deed was executed that Jay R. Swank's mind was remarkably clear for one who had been sick so long, and H. B. Ellworthy, pastor of the Methodist Episcopal Church at Lebanon, Oregon, who frequently visited and conversed with him for a week or ten days prior to his death, testified that he always thought him perfectly rational. Mrs. Swank was undoubtedly very much exhausted by her nightly vigil at her husband's bedside, and by her daily care in nursing him and ministering to his comfort, but that she did not have sufficient mental capacity to execute the deed is not borne out by the testimony; for in answer to the question, "What was your condition a week or so before your husband's death?" she said, "I was as well as common,—as well as ever I am." In explaining how she came to sign the

deed, she testified: "My husband asked me if I would not sign the papers, and I said 'Yes, Jay; I will do anything to stop worrying you;' and I signed because I thought he might stop fretting." It has been repeatedly held in this state that neither old age, sickness, debility of body, nor extreme distress incapacitates a party from disposing of his property, if he has possession of his mental faculties and understands the business in which he is engaged: *Clark's Heirs v. Ellis*, 9 Or. 128; *Chrisman v. Chrisman*, 16 Or. 127 (18 Pac. 6); *Luper v. Werts*, 19 Or. 122 (23 Pac. 850); *Franke v. Shipley*, 22 Or. 104 (29 Pac. 268); *In re Cline's Will*, 24 Or. 175 (41 Am. St. Rep. 851, 33 Pac. 542); *Carnegie v. Diven*, 31 Or. 366 (49 Pac. 831). Under the rule thus settled, we think the testimony shows that Jay R. Swank and his wife were fully competent to execute the deed, and knew the nature and effect of the business in which they were engaged.

5. It is contended by plaintiff's counsel that the answer in effect avers, and that the evidence shows, that the deed and the bill of sale were executed to secure the defendant on account of his liability as surety for Jay Swank on the Kees note, and that, construing the deed most favorably in the defendant's interest, the property described therein should be impressed with a lien to secure the payments he has made, and that the court erred in holding, in effect, that the deed and bill of sale were absolute. It is not alleged in the complaint, and we fail to find in the answer any averment, that the parties intended that the deed and bill of sale should be considered as mortgages to secure the payment of any sum whatever. The complaint is predicated upon the assumption that Jay R. Swank and his wife were mentally incapacitated to execute a valid contract, and that the deed was never delivered. The trial court found against the plaintiffs on both these grounds, which we think was fully war-

ranted by the testimony ; and, the answer not having alleged that the deed or bill of sale was intended as a mortgage, it is now too late to claim that such was the intention of the parties, and the decree is affirmed.

AFFIRMED.

Decided 30 July, 1900.

LIEUALLEN v. MOSGROVE.

[61 Pac. 1022.]

AMENDING PLEADINGS AFTER REVERSAL.

1. Pleadings may be amended at any time before trial, even to the extent of adding new causes of action or defense if connected with the subject-matter of the controversy, without regard to previous appeals or reversals, and the action of the trial court on applications to amend will not be reviewed except for a plain abuse of discretion resulting in a material injury to some substantial right of the appellant.

DAMAGES FOR NEGLIGENCE IN STARTING FIRE—AMENDMENT.

2. An amendment to a complaint for damages by fire caused by defendants' negligence, which charges negligence, not only in depositing ashes and live coals at a place from which fire would be liable to communicate to inflammable material, but also in not exercising requisite care in attending to and extinguishing the fire after it had been deposited on the ground, is germane to the controversy, and may properly be allowed by the trial court, even after reversal on appeal.

NONSUIT—SUFFICIENCY OF EVIDENCE OF NEGLIGENCE.

3. Defendants were operating a threshing machine run by a straw-burning engine, the method of removing ashes from which was by a trapdoor in the bottom of the ash pan, swung so that by tipping it the ashes would be dumped on the ground. Defendants were threshing in a field adjoining plaintiff's, on a windless day, and dumped ashes from the engine several times. Towards evening a wind arose, and a fire started near where the engine had stood, was communicated to stubble and inflammable material, and swept across plaintiff's field, causing him damage. An examination of the ashes on that evening disclosed live embers therein. *Held*, that the evidence presented a question of fact for the jury as to defendants' negligence in not extinguishing the fire, and that the overruling of a motion for a nonsuit was proper.

NEGLECT IN STARTING FIRE—EVIDENCE OF USUAL WINDS.

4. In an action to recover damages resulting from a fire caused by dropping from an engine in a stubble field ashes and coals the fire in which the defendants negligently failed to extinguish, it is proper to permit a witness who had lived in the country many years, and was familiar with climatic conditions, to testify as to the likelihood of a wind on the evening of a day such as that on which the fire causing the damage occurred; the likelihood of a wind arising being a material element in the question of defendants' negligence, as they had lived there many years and must have been familiar with local climatic conditions.

WITNESS—CROSS-EXAMINATION.

5. In an action for negligence in dumping ashes from an engine, and failing to extinguish fire in such ashes, where defendants' engineer has testified to the

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46	603n
37	446
48	314

exercise of an exceptional care on the part of defendants' servants in extinguishing such fire because of a previous fire that day from the same engine, it is proper to permit a cross-examination as to the location of the previous fire.

NEGLECTANCE IN STARTING FIRE—INSTRUCTION AS TO LIABILITY.

6. In an action for negligence in dumping ashes from an engine in a field adjoining plaintiff's, and failing to extinguish the fire in such ashes, an instruction that a person who negligently sets or keeps fire on his own land, or permits its escape therefrom, is liable, whether he might reasonably have anticipated the particular manner of its communication or not, and that in determining the question of diligence the jury could consider the dryness or dampness of the atmosphere and earth, the time of year, the likelihood of wind arising, and its probable direction and strength, is not objectionable, as seeking to charge defendants with the consequences of any extraordinary wind which might occur, but fairly presents the rule that, under such circumstances, defendants would be liable for the results of an ordinary and probable wind.

REFUSING INSTRUCTIONS ALREADY GIVEN—

7. A refusal to give an instruction already substantially covered by the court's general charge is not error.

From Umatilla: STEPHEN A. LOWELL, Judge.

Action by J. T. Lieuallen against Matt and James Mosgrove for damages caused by a fire originating where defendants' threshing engine had stood, and said to have been caused by carelessly dropping live ashes into the stubble and failing to extinguish the fire remaining therein. There was judgment for plaintiff.

AFFIRMED.

For appellants there was a brief over the names of *John J. Balleray* and *Thos. G. Hailey*, with an oral argument by *Mr. Balleray*.

For respondent there was a brief over the names of *Carter & Raley* and *Stillman & Pierce*, with an oral argument by *Messrs. Chas. H. Carter* and *A. D. Stillman*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

This is an action to recover damages for loss of property caused by fire, alleged to have been the result of defendants' negligence. The case was reversed at a former term because the plaintiff was allowed to recover

upon a ground of negligence not alleged: *Lieuallen v. Mosgrove*, 33 Or. 282 (54 Pac. 200, 664). After the cause had been remanded to the court below, the plaintiff was permitted to amend his complaint by alleging that the defendants were negligent, not only in depositing the ashes and cinders at a place where the fire contained therein would be liable to communicate to inflammable material, but also in failing to exercise due care and caution in caring for and extinguishing the fire after it had been deposited on the ground. The allowance of such amendment is the first assignment of error relied upon.

1. It must be regarded as settled in this state that the court may, before trial, allow a pleading to be amended by inserting a new cause of action or defense, if it is germane to and connected with the subject-matter of the controversy: *Baldock v. Atwood*, 21 Or. 73 (26 Pac. 1058); *Talbot v. Garretson*, 31 Or. 256 (49 Pac. 978). And the trial court has power and authority to allow such an amendment after reversal on appeal whenever this court does not make a final disposition of the cause, but remands it to the court below for further proceedings: *Powell v. Dayton, etc. R. R. Co.* 14 Or. 22 (12 Pac. 83); *Fowle v. House*, 30 Or. 305 (47 Pac. 787). It is equally well settled that the ruling of a trial court in refusing or permitting an amendment to a pleading will not be disturbed on appeal, unless there was a plain abuse of discretion, to the material injury of some substantial right of the appellant: *Foster v. Henderson*, 29 Or. 210 (45 Pac. 899); *Davis v. Hannon*, 30 Or. 192 (46 Pac. 785). The court, therefore, had power and authority to allow the amendment complained of, and, as there does not seem to have been any abuse of discretion, its ruling in reference thereto will not be disturbed.

2. The amendment is not, as counsel argue, such a

departure from the original complaint as to amount, in effect, to a new and wholly different cause of action. It does not change the substantial controversy between the parties. The real purpose of the action is to recover such damages as plaintiff may have sustained from the destruction of his property by fire, caused by the negligence of the defendants. The amendment was germane thereto, and tendered an issue on a material fact arising out of the transaction which forms the basis of plaintiff's action, and was entirely proper. As said in *Talbot v. Garretson*, 31 Or. 256 (49 Pac. 978): "So long as the amendment is germane to the subject-matter of the controversy, we can see no objection to the court, in the exercise of a sound discretion, allowing the pleadings to be amended in furtherance of justice by inserting new and additional allegations material to such controversy, although they may, in effect, constitute a new cause of action or defense."

3. The next assignment of error is predicated upon the overruling of defendant's motion for a nonsuit, and the refusal of the court to instruct the jury to return a verdict in favor of defendants on account of a failure of proof. The evidence shows that during the harvest season of 1897 defendants were engaged in operating a threshing machine, the motive power of which was a straw-burning engine, so constructed that the only method of removing ashes or cinders therefrom was by a trapdoor in the bottom of the ash pan, swung on a rod through the center, so that by tipping it the ashes could be dumped on the ground. In the forenoon of August 7 the defendants were threshing in the field of one Bergevin, adjoining that of plaintiff, and during that time dumped the ashes or cinders from the engine on the ground several times. The day was calm, hot, and sultry until evening,

when a wind arose, and caused a fire, which started at or near the place where the engine stood, to communicate to the stubble and inflammable material, sweep over Bergevin's field, and into the adjoining field of plaintiff, and burn up and destroy large quantities of wheat, straw, and stubble pasture belonging to him. It seems quite probable, from the physical facts, that the fire originated in the ashes and cinders which had been dumped from the defendants' engine, and the witnesses Wood and McFarland testify that they examined the cinder pile on the evening of the fire, and found live embers in it. This evidence at least tends to show that the defendants did not extinguish the fire in the ashes or cinders before leaving the field, and for this reason a fire subsequently broke out, and destroyed the plaintiff's property. And while, as said in the former opinion, "no negligence can be imputed to the defendants from the mere fact that ashes, which necessarily contained some fire, were taken from the engine and placed upon the ground" (*Lieuallen v. Mosgrove*, 33 Or. 282 (54 Pac. 200, 664), they were bound to exercise reasonable care and diligence to extinguish the fire, or take other reasonable precautions to prevent it from igniting the stubble and other dry and combustible material, and thus destroying the adjacent property. Whether they exercised such care was, under the testimony, a question of fact for the jury, and the court committed no error in overruling the motion for a nonsuit: 13 Am. & Eng. Enc. Law (2 ed.), 491; *McClelland v. Scroggin*, 48 Neb. 141 (66 N. W. 1123); *Hanlon v. Ingram*, 3 Iowa, 81; *Hewey v. Nourse*, 54 Me. 256.

4. It is also insisted that the court erred in permitting the witness Coppock to answer the following question: "State whether or not a high wind usually follows, during the month of August, a close, sultry afternoon." The witness had previously testified that he had lived in that

section of the country for many years, was acquainted with climatic conditions during the harvest season, and that the afternoon preceding the fire had been close, hot, and sultry. We think, under such circumstances, the question, and affirmative answer thereto, were proper and competent. The dryness of the season, the proximity to the engine of dry, combustible material, easily ignited, and the probability of a wind coming up, were proper matters to be considered by the jury in determining whether the defendants, under the surrounding circumstances, used the requisite degree of prudence and caution to prevent the fire from communicating to and destroying the adjoining property. They were using a dangerous element, under circumstances of special danger to adjacent property, and were therefore required to exercise care and vigilance commensurate with such danger; and, in this connection, the probability or likelihood of a wind arising was important: 13 Am. & Eng. Enc. Law (2 ed.), 418; *Needham v. King*, 95 Mich. 303 (54 N. W. 894); *Salisbury v. Herchenroder*, 106 Mass. 458 (8 Am. Rep. 354); *Kellogg v. Chicago & N. W. Ry. Co.* 26 Wis. 223 (7 Am. Rep.) 69. The defendants had resided in that section of the country for several years, and were necessarily familiar with the climatic conditions, and if a wind was liable to blow in the evening, and thus greatly enhance the danger from any fire that might be left in the ashes or cinders, they were bound to increase their care on that account. The line of liability is drawn in some of the adjudications between cases where the operation of a wind has been usual and ordinary, and where it has been extraordinary, or of a nature entirely unexpected; the defendant being held responsible in the former instance, but not in the latter. But it was not sought by the testimony of Coppock, as we understand it, to make the defendants liable for an extraordinary or unprece-

dented wind, but only on account of the intervention of that which was usual and ordinary.

5. Again, it is argued that the court erred in permitting the witness Kinney to show, on a map used at the trial, the place where another fire from defendants' engine occurred on the same day. Kinney was the engineer in charge of the engine on the day of the fire. On direct examination, he testified to the care and caution exercised by himself and defendants' other servants and employees in caring for and extinguishing the fire in the ashes or cinders taken from the engine, and on cross-examination stated that at the setting where the fire is claimed to have originated they used more caution than usual because of some previous fire. It was on account of this statement that he was interrogated by counsel as to the location of the previous fire, and we think it was proper cross-examination.

6. The next assignment of error is predicated upon the giving by the trial court of the eighteenth and twenty-first instructions. These instructions are very long, but it is only necessary to call attention to the objectionable parts pointed out by appellants in their brief. In the eighteenth the court said that a person who negligently sets or keeps a fire on his own land, or permits it to escape therefrom through negligence, is liable to his neighbor for injuries caused thereby, whether he might reasonably have anticipated the particular manner of its communication or not. And again, "In determining the question of diligence, you have a right to take into consideration the dryness or dampness of the atmosphere and the earth, the strength and probable direction of the wind," etc. In the twenty-first, the court, among other things, said: "Among other circumstances, you may consider the time of year when the fire occurred; the business in which defendants were engaged when it oc-

curred; what, if any, probability there then was of winds arising." The objection urged to these instructions is that the court meant to have the jury understand that defendants were liable for the result of any extraordinary wind that might occur. But we do not think this is a reasonable or fair interpretation of the instructions. The court evidently intended to, and did, state to the jury the rule of law already indicated, that the question of reasonable care and diligence must be determined from the circumstances, and in a measure depend upon the facts of each particular case.

7. The remaining assignments of error are based upon the refusal by the trial court to give divers and sundry instructions requested by the defendants. We have examined and compared the instructions refused with those given, and are of the opinion that the instructions refused were substantially covered by the general charge. It follows that the judgment of the court below must be affirmed, and it is so ordered.

AFFIRMED.

Decided 30 July; rehearing denied 15 August, 1900.

RADER v. BARR.

[61 Pac. 1027.]

TRANSCRIPT AS AN ITEM OF COSTS.

1. The cost of preparing the transcript for an appeal must be paid primarily by the appellant, and the respondent cannot include it in his cost bill under any circumstances.

INJUNCTION TO RESTRAIN COLLECTION OF ILLEGAL COSTS.

2. Equity will interfere by injunction to restrain the collection of costs irregularly taxed without complying with the requirements of the statute as to notice, where the remedy at law is not available owing to the irregular practice of the taxing party, and the collection of such costs would be a manifest wrong: *Oregon Ry. & Nav. Co. v. Gates*, 10 Or. 514, applied.

PRACTICE IN FILING COST BILLS IN SUPREME COURT.

3. The provision of Section 558, Hill's Ann. Laws, requiring service of cost bills when filed more than five days after the entry of the judgment or decree, regulates the practice in the supreme court as well as in the circuit courts.

From Grant: MORTON D. CLIFFORD, Judge.

87	453
89	527
87	453
48	487

This is a suit by George Rader to enjoin the collection in part of a judgment for costs and disbursements by this court August 13, 1898, in favor of Emmet Barr as respondent, and against George Rader as appellant, for \$215.85: 33 Or. 375 (54 Pac. 210). The allegations of the complaint are, in substance, as follows: That in the case of *Emmet Barr* (respondent) v. *George Rader* (appellant) a judgment was rendered in favor of the respondent by the Supreme Court of the State of Oregon at its Pendleton May term for the year 1898; that thereafter, to wit, on September 5, 1898, the respondent filed a cost bill therein, composed of the following items:—

Printing brief.....	\$ 39 00
Cost of transcript.....	139 00
Clerk's fee, \$40; paid on this, \$——; due.....	22 85
Costs.....	15 00
	\$215 85

That the item, "cost of transcript" was wrongfully and fraudulently inserted in said cost bill by the respondent or his attorneys; that the same was paid by the appellant before the cost bill was filed, and that therefore it should not have been included therein; that the clerk's fees upon the appeal were \$22.85, and no more; that of said amount the appellant paid \$10 prior to the rendition of judgment, and that at the time of filing said cost bill there was due for clerk fees \$12.85, and no more; that no objections were filed to said cost bill by the appellant within the time prescribed by law, and that the total amount thereof, to wit, \$215.85, was allowed and taxed by the clerk; that the Pendleton May term of said court adjourned for the term on August 13, 1898; that on October 13, 1898, by virtue of the mandate from the supreme court, a judgment was entered in the circuit court for Grant County in favor of Barr and against Rader for the sum of \$215.85, the full amount of said cost bill; that neither Rader nor any of his attorneys knew, nor were

any of them informed, of the said wrongful and fraudulent charges contained in said cost bill until after the supreme court had adjourned for the term and the entry of the judgment in the circuit court. The prayer is that the judgment be set aside as to said items, that defendant be enjoined from enforcing the collection thereof, and for general relief. A motion to strike from the complaint the words "wrongfully and fraudulently" and "wrongful and fraudulent" being sustained, a demurrer was interposed upon the ground that the complaint does not state facts sufficient upon which to base equitable relief, which was also sustained, and a decree rendered dismissing the suit, from which plaintiff appeals.

MODIFIED.

For appellant there was a brief over the name of *Lucian Evarts*, with an oral argument by *Mr. S. A. Newberry*.

For respondent there was a brief over the names of *Cattanach & Wood* and *Carter & Raley*, with an oral argument by *Mr. Chas. H. Carter*.

MR. JUSTICE WOLVERTON, after stating the facts, delivered the opinion of the court.

The sole question presented is whether the complaint states facts sufficient to entitle the plaintiff to the relief prayed for. The incident of the filing and allowance of the motion to strike out is not material to the inquiry, and will not receive further notice. In order that the nature of the controversy may be made clear, a brief reference will be made to the manner of recovering costs and disbursements, and having the same taxed, so as to entitle them to be entered as a part of the judgment or decree. Costs are certain sums allowed the prevailing party by way of indemnity for his attorney fees in the suit or action, and disbursements comprise such expendi-

tures as are necessary to maintain or defend the same, and include fees of officers and witnesses, the necessary expense of taking depositions, the publication of summons or notices, outlays for postage, compensation of referees, and the necessary expense of copying records, etc., used as evidence at the trial: Hill's Ann. Laws, §§ 548, 552, 553. Every witness, officer, or other person required to do or perform any act or service for any party to an action or suit is entitled to demand and receive his compensation in advance; but the party may pay the fees of officers, or give an undertaking therefor, at his option. Costs and disbursements are allowed by the clerk; but no disbursements can be allowed unless the party claiming them shall have filed with the clerk, within five days from the entry of the judgment or decree, a statement of the same, which shall be verified except as to fees of officers. Such statement may be filed, however, at any time after five days; but in such case a copy thereof must be served upon the opposite party. A statement of disbursements thus filed must be allowed, of course, unless the adverse party, within two days from the time allowed to file the same, shall file his objections thereto, stating the particulars thereof: Hill's Ann. Laws, § 556. When objections are preferred, provisions are made for filing an amended verified statement, and an allowance or disallowance by the clerk of the charges claimed: Hill's Ann. Laws, § 557; *Nicklin v. Robertson*, 28 Or. 278 (52 Am. St. Rep. 790, 42 Pac. 993).

1. The item of \$15 in the statement contained in the complaint, being presumably for the statutory attorney fees in this court, is properly denominated "costs." All the other items are disbursements. The item of \$139, as we understand from the complaint, is for a disbursement incurred by Rader upon his own account, and which Barr could in no event recover.

2. As it respects the \$10 item, it is not apparent that Rader was entitled to it in the first instance ; but, if Barr paid it once, it would be inequitable and unjust to require him to pay it again. Notwithstanding this palpable injustice, it is insisted that, as plaintiff did not file objections to the statement of disbursements, and the objectionable items having become a part of the judgment, he is now precluded from resorting to a court of equity for relief ; in other words, it is argued that plaintiff had a good defense at law, which he neglected to interpose at the proper time, and is therefore precluded by the judgment. The proceeding was at law, and the defense by way of interposing objections purely legal in its nature ; but these conditions do not, of themselves, constitute an insuperable barrier to equitable interference. "Injunctions to restrain proceedings at law are granted," says Mr. Chief Justice SEARLS, in *Reagan v. Fitzgerald*, 75 Cal. 230 (17 Pac. 198), "in instances where the facts show it to be against conscience to enforce such proceedings, and at the same time show that the injured party could not have availed himself of such facts in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence on his part. * * * A case for relief by way of injunction against a judgment at law must present facts, not only showing the equitable rights of the complaint, but also showing that he could not have availed himself of such facts in the legal forum." So, in *Oregon Ry. & Nav. Co. v. Gates*, 10 Or. 514, an injunction was sustained, relieving a garnishee from the payment of a judgment rendered against it for a demand which it had previously satisfied, but had by mistake made answer in the garnishee proceedings that it was still indebted to the debtor of the attaching creditor. The doctrine of that case is that, in order to obtain

the injunction, it must be made to appear that the failure to make the appropriate answer or interpose the requisite defense was not attributable to any negligence or want of diligence on the part of the party invoking the equitable remedy, but was the result of accident or fraud, or the act of the opposite party, and, further, that the plaintiff has a good defense to the whole or such part of the cause of the action he proposes by his complaint to litigate, and thereby show that it would be unfair and inequitable to permit the judgment complained of to be enforced. To the same purpose, see *Freeman v. Miller*, 53 Tex. 372; *Wingate v. Haywood*, 40 N. H. 437.

3. Applying this settled doctrine of equitable jurisprudence, we are readily enabled to determine the controversy here. By the allegations of the complaint, the judgment rendered in this court must have been entered on or prior to August 13, so that it is apparent the statement of costs and disbursements was not filed within five days from the entry of judgment. This made it incumbent upon the respondent in that cause to serve the appellant with a copy of the statement; otherwise, he was not bound to take notice of it. He was only bound to take notice of what was done with respect to filing the statement for the space of five days after the entry of the judgment, but after that time had run he should have been notified by service of a copy; otherwise, he could not be charged with notice of the filing of the statement, and thereby be precluded by the action of the clerk. In such case, negligence or want of diligence cannot be imputed to the party failing to file the objections. Indeed, the omission would be attributable to the act of the party filing the statement in not giving the requisite notice thereof. The "cost of transcript" was not a proper item for which the respondent was entitled to recover of appellant under any circumstances. So with the item of clerk's

fees. It is shown that plaintiff had paid \$10 towards it. It would seem, therefore, that he has a good defense to that portion of the cost bill which he now seeks to controvert, and it would be inequitable and unjust to compel him to pay it again under execution for the enforcement of the judgment.

In testing the sufficiency of the complaint by the demurrer, it must be construed most strongly against the pleader. It is alleged that neither George Rader nor any of his attorneys knew or were informed that such charges had been inserted in the cost bill until after the supreme court had adjourned and the judgment had been entered in the circuit court. This is somewhat in the nature of a statement of a conclusion. By another allegation we are advised "that no objections to said cost bill were filed by said appellant within the time prescribed by law." This would imply that he was required to file objections, but had not. If such is the case, his excuse for not filing them is not sufficiently alleged by the statement that neither he nor his attorneys had notice or knowledge of the insertion of the charges complained of. Under this allegation, we cannot say that the appellant had not been served with a copy of the statement of costs and disbursements, and that it was not his duty to have appeared and filed objections; otherwise he would have been precluded by the clerk's taxation of costs and disbursements and their entry in the judgment. The complaint is faulty in this particular, while in other respects it appears to be sufficient; but, with a view of giving the plaintiff an opportunity of yet stating a good cause, if he has one, the decree of the court below will be reversed in so far as it dismissed the suit, and affirmed in sustaining the demurrer, and the cause will be remanded for such other proceedings as may seem proper.

REVERSED.

Decided 15 August, 1900.

ON MOTION FOR REHEARING.

MR. JUSTICE WOLVERTON delivered the opinion.

Since the rendition of the opinion and entry of decree herein, the respondent has filed a petition for rehearing, by which it is urged that the cause ought to have been dismissed, instead of being remanded. In this we cannot concur, but, as the respondent has virtually prevailed in this court, the appellant should pay the costs of the appeal. The decree will therefore be modified accordingly, and the petition for rehearing denied.

MODIFIED AND REHEARING DENIED.

Argued 23 April; decided 11 May, 1900.

BURNESSE v. MULTNOMAH COUNTY.

[60 Pac. 1005.]

EQUITY—TAXPAYER'S INJUNCTION AGAINST ILLEGAL CONTRACT.

1. An individual taxpayer may maintain a suit to enjoin the illegal diversion of public funds or property when it appears that the result of such diversion will be to increase the rate of taxation to be borne by all taxpayers: *Brownfield v. Houser*, 30 Or. 534, applied.

COUNTIES—ILLEGAL CONTRACT TO COLLECT TAXES.

2. A contract by county commissioners providing that, in consideration of N's agreeing to assist in the collection of delinquent county taxes, the county court will order the issuance of an alias warrant for their collection, and will advertise and sell the land and mortgages described in certain delinquent tax rolls to be prepared; that the proper county officers will bid in all property sold for which there may be no other bidders; and that N may obtain the certificate for any parcel so sold by paying the amount for which it had been sold to the county, is void as interfering with the duties of the county court, in that it provides in advance for the issuance of alias warrants, and requires the county judge to bid in all property offered for sale thereunder for which there may not be other bidders.

COUNTIES—INTERFERENCE WITH PUBLIC OFFICERS.

3. A contract between a board of county commissioners and a private person under which the latter is to furnish corrected descriptions for parcels of realty not correctly or sufficiently described in the tax rolls, and the board is to direct the clerk to use such corrections in preparing delinquent tax rolls is void as an attempt by the board to control the action of the clerk by making him prepare false delinquent rolls and causing him to alter the public records.

From Multnomah: JOHN B. CLELAND, Judge.

37	481
37	482
37	480
47	54

This is a suit by James J. Burness, a resident and taxpayer of Multnomah County, against the board of county commissioners for that county and others for a decree annulling and declaring void a contract between the county and defendant Noble. On September 19, 1898, Noble and the county judge (assuming to act for the county) entered into the following contract :

“ This memorandum and agreement, made this nineteenth day of September, 1898, by and between the County of Multnomah, State of Oregon, party of the first part, and H. E. Noble, party of the second part, witnesseth : That whereas a large amount of delinquent taxes upon mortgages and other real property for the years 1887 to 1895, inclusive, still remains unpaid, and the county has been wholly unable to collect the same by ordinary means ; and whereas by reason of the lapse of time, and from other causes, it has been found, and is still deemed, impossible to find bidders for a great amount of such property if exposed for sale in the ordinary course ; and whereas the county is desirous of making an arrangement whereby the collection of said taxes may be energetically prosecuted without loss or expense to the county. Now, therefore, it is agreed between said county and said H. E. Noble, that the county court shall make an order for the issuance of an alias warrant or warrants for the collection of all delinquent mortgage and real-property taxes for the years 1887, 1888, 1889, 1890, 1891, 1892, 1893, 1894, and 1895, and shall cause to be made out such delinquent rolls or lists as may be proper or necessary for the collection of such taxes, the same to be corrected as hereinafter provided, and to advertise and sell, in due form, and in all respects as provided by law, the real property and mortgages upon which taxes are delinquent for the said years, or any of them, mortgage taxes to be collected from the land mortgaged, or from the mortgagee, as the court may specifically direct ; that the county judge shall bid in for the County of Multnomah all property offered at such sale for which there shall be no other bidders, and shall take certificates of

sale to the county, in due form of law ; that in consideration of the terms and conditions of this agreement, to be kept and performed by said H. E. Noble, said certificates shall be forthwith assigned, transferred, and set over by the proper officers of the county to said H. E. Noble, or to such person as may be designated, but in such case said Noble shall remain responsible for the due performance of all conditions of this contract on his part in like manner as if assignment had been made to himself, such certificates to remain in the custody of the county judge. And the said H. E. Noble agrees to prepare at his own cost and expense, and furnish to the county, corrected lists of the various properties to be sold for said taxes, giving corrected descriptions of the real property as the same appear on the deed and mortgage records of Multnomah County, showing double assessments and taxes paid, but not credited, and other errors affecting collection of such taxes, and generally furnishing such facts and details as may be necessary, supplementary to the rolls and returns now on file or of record for the taxes of such years, as shall enable the proper officers to make out complete and correct rolls of such delinquent taxes, and of the properties to be sold therefor, so far as such facts can be ascertained from diligent and careful examination of the county records ; the county, on its part, agreeing to make use of all such data, and to take all steps and proceedings carefully and precisely in accordance with law, so far as possible. And said Noble further agrees to use all due and diligent effort for the collection and enforcement of such taxes, availing himself of the means and methods followed by him in the case of taxes which he bids in for himself or others, and particularly to seek out and obtain, as far as possible, the addresses of all persons owning or interested in any of the properties sold, whether resident or nonresident, and to notify such persons of the taxes due, and seek payment from them, and generally to take all lawful means for the collection of such taxes out of the property taxed, or from the persons against whom such taxes are charged, or their successors or assigns ; and on the payment of any tax or redemption of the property

sold by or for any taxpayer, or his successors or assigns, the county shall receive out of such moneys the amount of the tax and its actual cost lawfully expended, and all sums in excess thereof which may be lawfully collected, including penalty, interest, and redemption fees, shall be retained by said Noble, and shall constitute his sole compensation under this contract; *provided*, that in no case where collections are made shall the compensation of said Noble be less than the penalties now provided by law; but said Noble is to make no charge whatever against the county for his services under this contract. It is further expressly agreed and understood by and between the parties hereto that the county court is left free and untrammelled in making any compromise or concessions in the settlement of any irregular or illegal assessments, and the said H. E. Noble shall only receive compensation of such proportion of the amount collected as the penalties provided by the law now in force bear to the whole amount due, based on the actual amount of money received by the county in such cases. Where any tax and costs are wholly remitted, said Noble shall receive no compensation, and said county shall retain the absolute right to adjust any and all claims for taxes so that no injustice may be done the owner of property included under this contract. It is also understood and agreed that said work shall be diligently and vigorously prosecuted by said H. E. Noble; that he shall make reports to the county court when called for, and, in event said work shall not be prosecuted as aforesaid, then this contract shall be declared null and void, and said certificates reassigned.

"In witness whereof, the parties hereto have hereunto set their hands, and caused these presents to be executed by the County Court of Multnomah County, under its corporate seal, the day and year first above written.

(Signed) MULTNOMAH COUNTY, OREGON,
By W. M. CAKE, County Judge.

(Signed) H. E. NOBLE."

After the contract was executed the legislature passed an act providing a separate board for the transaction of county business in Multnomah County, by the terms of which an additional commissioner was provided, who "shall succeed and take the place of the county judge" in the transaction of county business: Laws 1898, p. 28. Thereafter, on November 29, 1898, the following supplemental contract was entered into between the county commissioners and Noble:

"Memorandum of agreement made this twenty-ninth day of November, 1898, by and between the County of Multnomah, State of Oregon, party of the first part, and H. E. Noble, party of the second part, witnesseth, that for and in consideration of the covenants and agreements made and entered into between the parties hereto on the nineteenth day of September, 1898, and to be kept and performed by them, and for the further consideration of avoiding any question as to the legality of said contract so heretofore entered into between the parties hereto, it is now mutually agreed as follows: That the said contract of the nineteenth of September, 1898, be, and the same is hereby modified in the following respects—first, wherever said contract provides that rolls, lists, or other records shall be corrected, it is understood that 'corrected' shall mean only that the descriptions now contained in said records may be completed, and that said rolls shall in all other respects be exactly copied, and no omissions or other alterations made therein, errors and omissions excepted; second, that, in place of the county judge, it is understood that the county commissioners, as the legal successors of said county judge, shall bid in the properties offered for sale, with the understanding and proviso that the said county commissioners may bid them all in for the purpose and with the intention of clearing up and disposing of all the said delinquent taxes; third, that the provision in said contract that the certificates of sale be assigned to said H. E. Noble, or some other person named by him, shall be entirely eliminated therefrom, and said certificates shall re-

main the property of Multnomah County after purchase ; that the said Noble shall perform the services otherwise required of him under said contract, and act as agent of the county ; the county to make the collections through the clerk of the county court in the usual manner, and to render to H. E. Noble the same proportions thereof as provided by said contract, and to enter an order directing the clerk to pay the same to him out of the collections made ; fourth, it is further agreed and understood that the said H. E. Noble shall have the right at any time to pay to the County Clerk for Multnomah County the amount for which any parcel has been sold, in which event the said certificate shall, by the proper authorities, be assigned and transferred to said H. E. Noble, with all rights thereunder ; fifth, and said Noble further agrees that, if a suit shall be brought against the county under this contract on account of the adding of descriptions to the assessment roll as contemplated therein, he will defend the same, and pay the costs therein, so that the county shall be put to no expenses in testing said question of such suit. It is further understood and agreed between the parties hereto that the original contract of September 19, 1898, with these modifications as herein set forth, shall be and become the contract of the parties hereto, and be carried out by them under both of said instruments.

"In witness whereof, the said Noble hereunto set his hand and seal, and said Multnomah County, acting by and through the County Commissioners for Multnomah County, by order heretofore duly entered by said board of county commissioners, have set their hands and affixed the seal of the board to this and another instrument, of like date and tenor, the day and year herein first above written.

(Signed)

MULTNOMAH COUNTY,

By PHILO HOLBROOK.

[Seal.]

W. B. STEEL,

H. C. SMITH,

County Commissioners.

[Seal.]

(Signed)

H. E. NOBLE."

The complaint, after alleging that plaintiff is a resident and taxpayer of Multnomah County, the official character of the other defendants, and setting out the contract and modification thereof in full, avers, in substance, that the contract as modified is illegal and void, as against public policy, and because it was not within the power of the county judge or commissioners; that, upon the day the modification of the contract was executed, the board of commissioners made an order requiring the clerk to prepare delinquent tax lists for the years 1887 to 1895, inclusive, and to issue and attach thereto a warrant for the collection of the taxes appearing thereon; that thereupon defendant Noble and the county clerk proceeded to make out such lists, and in doing so incorporated therein false and fraudulent descriptions furnished by Noble of the property taxed; that the clerk attached to such pretended tax rolls a warrant for the collection of delinquent taxes, under his hand and the seal of the county court, and delivered the same to the sheriff, who advertised the property therein described for sale at various dates between the second and thirteenth days of May, 1899; that unless the further carrying out of the contract is enjoined, and it is declared to be void, a large amount of money will be illegally paid out, and valuable property of the county transferred to Noble, without consideration. A demurrer to the complaint was overruled by the court below, and, the defendants refusing to plead further, a decree was entered against them, from which they appeal. **AFFIRMED.**

For appellants there was an oral argument by *Messrs. Richard W. Montague, Martin L. Pipes, and Alex. Bernstein*, with a brief over the names of *Pipes & Tift, Bernstein & Cohen, R. W. Montague, and J. C. Moreland*, to this effect:

The question is merely one of power in the commissioners to make this contract. Section 896 of Hill's Ann. Laws gives the county court (now the county commissioners under the act of 1898) power and authority "to have the general care and management of the county property, funds and business, where the law does not otherwise expressly provide." This power is general and not special: *Levy Court v. Coroner*, 69 U. S. (2 Wall.) 501; *Shanklin v. Commissioners of Madison County*, 21 Ohio St. 575; *Schwamblé v. Sheriff*, 22 Pa. St. 18; *State v. Piatt*, 15 Ohio, 15-23; *Burnett v. Markley*, 23 Or. 436.

The doctrine that the county court (now board) has no power to interfere in the discharge of duties assigned by law to other officers is fully recognized in the cases which we cite; but the common sense of courts has distinguished between the duties of officers and the results sought, between the procedure and its purpose. Assistance in performing these duties is the purpose of the general grant of power: *Hoffman v. Board of Comrs.* 96 Ind. 84-111; *Biggs v. Caldwell County*, 28 Mo. 586; *Martin v. Whitman County*, 1 Wash. 533 (20 Pac. 599); *Allen v. Cedar County*, 34 Iowa, 54; *Page v. Am. Emigrant Co.* 41 Iowa, 115; *Hawk v. Marion County*, 48 Iowa, 472; *Wilhelm v. Cedar County*, 50 Iowa, 254; *Call v. Hamilton County*, 62 Iowa, 448; *Tasker v. Commissioners of Garrett County*, 82 Md. 150.

For respondents there was a brief and an oral argument by Messrs. Wm. M. Gregory and Henry St. Rayner.

MR. JUSTICE BEAN, after stating the facts in the foregoing words, delivered the opinion of the court.

1. It is contended that the plaintiff cannot maintain this suit, because he will suffer no direct and peculiar injury from the carrying out of the contract in question.

It is the settled doctrine in this state that an individual taxpayer may, by a suit in equity, restrain and prevent the misapplication or illegal diversion of the public funds or property (*Carman v. Woodruff*, 10 Or. 133; *White v. Commissioners*, 13 Or. 317, 57 Am. Rep. 20, 10 Pac. 484; *Wormington v. Pierce*, 22 Or. 606, 30 Pac. 450; *Sherman v. Bellows*, 24 Or. 553, 34 Pac. 549; *Avery v. Job*, 25 Or. 512, 36 Pac. 293; *State v. Pennoyer*, 26 Or. 205, 37 Pac. 906, 41 Pac. 1104, 25 L. R. A. 862; *State ex rel. v. Lord*, 28 Or. 498, 43 Pac. 471, 31 L. R. A. 473; *Brownfield v. Houser*, 30 Or. 534, 49 Pac. 843); and we think plaintiff is within this rule. It is stipulated and agreed in the contract that all moneys which would otherwise go to the county on the redemption of lands sold for delinquent taxes for specified years, for "penalty, interest and redemption fees," shall be paid to Noble. If, therefore, the contract is void, such payment would necessarily be a wrongful diversion and misapplication of the county funds, to the injury of every taxpayer. It is claimed, however, that, were it not for the contract with Noble, there would be no "penalty, interest or redemption fees" on delinquent taxes for the years specified. But the court is bound to assume that the county authorities will, in good faith, and without the added stimulus of a contract with a private individual, enforce the collection of delinquent taxes as required by law. The plaintiff, therefore, is entitled to maintain this suit, if the contract is void, as we think it is. It is not only, in effect, an agreement by the board of county commissioners to use the general governmental machinery in the collection of delinquent taxes for the benefit, primarily, of a private individual, but it undertakes to interfere with the discharge of the duties assigned by law to other officers, and is therefore beyond the power of the board of commissioners to make: *City of Ft. Wayne v. Lehr*,

88 Ind. 62; *Smith v. Los Angeles County*, 99 Cal. 628 (34 Pac. 439); *House v. Los Angeles County*, 104 Cal. 73 (37 Pac. 796).

2. The contract, as modified, stipulates, in substance, that the county court will order the issuance of an alias warrant for the collection of taxes of 1887 to 1895, inclusive, and will cause to be made out delinquent rolls or lists, to be corrected by using the descriptions furnished by Noble of real property or mortgages to be sold for taxes, as the same appear on the deed and mortgage records of Multnomah County, and advertise and sell the real property and mortgages therein described; that the proper county officers will bid in all property offered for sale for which there shall be no other bidders; and that Noble shall have the right at any time to pay to the county clerk the amount for which any parcel has been sold, in which event the certificate shall be transferred and assigned to him. It is further provided that all collections shall be made through the clerk of the county court in the usual manner, Noble to act as the agent of the county, and to use all due and diligent efforts in the collection of taxes, "availing himself of the means and methods followed by him in the case of taxes which he bids in for himself or others." On payment of any taxes, or redemption of the property sold, the county is to retain the amount of the tax and its costs, and all sums in excess thereof, including penalty, interest, and redemption fees, shall be paid to Noble, and shall constitute his compensation under the contract, provided that in no case shall his compensation be less than the penalties provided by law, and, if suit be brought against the county under the contract on account of the adding of descriptions to the assessment roll, as contemplated therein, Noble is to defend the same and pay the costs. Now, this statement of the several provisions of the contract is sufficient, in

our opinion, to show its invalidity. In the first place, it undertakes to interfere with the duties of the county court, by providing in advance that an alias warrant for the collection of delinquent taxes shall be ordered issued by that tribunal. Again, it undertakes to interfere with the duties of the county judge, or his successor, by stipulating that he shall bid in for the county all property offered for sale under such alias warrants, for which there are no other bidders. These objections may be considered as formal and somewhat technical.

3. A more serious and insurmountable one, however, is that the board of county commissioners undertakes by the contract to interfere with the duties of the county clerk, by stipulating how and from what data he shall make delinquent tax lists, when his duties in that regard are specially prescribed by statute, and the board of county commissioners or county court has no control over him, except, perhaps, to see that he faithfully executes the duties of his office. The statute requires the county assessor to set down in the assessment roll "a description of each tract or parcel of land to be taxed, specifying under separate heads the township, range, and section in which the land lies; or, if divided into lots and blocks, then the number of the lot and block" (section 2770); and, after the necessary "alterations in the description of lands or other property upon such roll" has been made by the county court (section 2782), the county clerk is required, within a certain specified time, to deliver a transcript of the assessment roll to the sheriff, with a warrant attached for the collection of the taxes charged thereon (section 2794). If the sheriff shall be unable to collect the same, he is required to make out a statement of the taxes remaining unpaid, with a full and correct description of the real estate taxed, from his tax roll, and return the same to the county court, with the proper affidavit

annexed, by the first Monday in April after the date of the tax list (sections 2809-2811). It is the duty of the county clerk, after the return of the delinquent list by the sheriff, and within ten days thereafter, to make "from said delinquent tax roll a true and correct list of the taxes returned as unpaid, and a correct description of the lands or town lots, if the same can be made" (section 2814), and deliver the same to the sheriff of the county, with a warrant attached, commanding him to levy upon the goods and chattels of the delinquent taxpayer, and, if none be found, upon the real property set forth in the tax list, or so much thereof as may be necessary to satisfy the amount of taxes, costs, and expenses. It thus appears that there is no power or authority vested by statute in any person or tribunal to change the description of real estate contained in the assessment roll after it has been approved by the county court. But the contract with Noble provides that he shall prepare corrected descriptions of the real property to be sold for taxes, "as the same appear on the deed and mortgage records of Multnomah County," and, generally, to furnish "such facts and details as may be necessary, supplementary to the rolls and returns now on file or of record for the taxes of such years, as shall enable the proper officers to make out complete and correct rolls of such delinquent taxes, and of the properties to be sold therefor, so far as such facts can be ascertained from diligent and careful examination of the county records," and the county agrees to make use of such data; thus, in effect, providing for the alteration and changing of a public record, and the making of a new and false delinquent tax roll. Clearly, such a contract cannot be sustained.

The claim is made that, under the contract as modified, the only corrections contemplated of the descriptions of real estate contained in the roll were such as might be

necessary to make them complete. The language of the contract in this regard is that "wherever said contract provides that rolls, lists, or other records shall be corrected, it is understood that 'corrected' shall mean only that the description now contained in said records may be completed, and that said rolls shall in all other respects be exactly copied, and no omissions or other alterations made therein, errors and omissions excepted." What the parties meant by the word "completed" can only be gathered from the other provisions of the contract, from which it is quite clear that a change in the descriptions of real estate was contemplated. This is apparent from the entire contract, and is especially evidenced by the fifth subdivision of the modified contract, wherein Nobles agrees that, if suit be brought against the county "on account of the adding of descriptions to the assessment roll as contemplated therein," he will defend and pay the costs of such suit. So we conclude the contract is susceptible of no other reasonable construction than that it contemplated an alteration and change, if necessary, in the descriptions of real property upon the delinquent assessment rolls for the years specified. It was further argued that under section 2814 the county clerk is authorized, in making up the delinquent list, to go outside of the roll for data from which to obtain a correct description of the land or town lots taxed. But it seems to us the plain and obvious meaning of the section is that the delinquent list shall be made from the delinquent tax roll as returned by the sheriff, and the description of the land or town lots be obtained from that source, and no other.

There are other provisions of the contract which naturally challenge attention, but sufficient has been noted to show its invalidity. It may be conceded that if Mr. Noble had been employed by the county commissioners to com-

pile information which other county officers could legitimately make use of in the performance of their duties, and had contracted to pay him a proper compensation therefor, such contract would be valid: *Burnett v. Markley*, 23 Or. 436 (31 Pac. 1050). But the work he engaged to do was not of that character. The decree of the court below is affirmed.

AFFIRMED.

Argued 6 December, 1899; decided 29 January; rehearing denied 15 August, 1900.

JONES v. ADAMS.

[50 Pac. 811, 62 Pac. 116; 50 L. R. A. 388.]

CROPS—TITLE OF PURCHASER OF THE LAND—SEVERANCE.*

1. A chattel mortgage on crops growing upon mortgaged land is not a constructive severance of them which will prevent their passing to a purchaser of the land on foreclosure sale made while the crops are still standing. Unless there has been an actual severance, the crops pass with the title of the soil to which they are annexed.

WHEN RENT IS DUE UNDER A CROP LEASE.

2. Where land is leased for a part of the crop to be raised thereon, and there is no stipulation as to the time of payment, the share is due when the crop is harvested or within a reasonable time thereafter.

From Klamath: W. C. HALE, Judge.

Action by Mary A. Jones against J. F. Adams to recover personal property. From a judgment for defendant, plaintiff appeals.

REVERSED.

*NOTE.—On the question whether crops are personal property for the purpose of levy and sale, see *Polley v. Johnson*, 23 L. R. A. 258; *Barrett v. Choen*, 12 Am. St. Rep. 363, 366; *Sparrow v. Pond*, 32 Am. St. Rep. 571, 575, 16 L. R. A. 103.

As to the right of a tenant to crops and emblements after a sale on foreclosure of a mortgage, see *Richards v. Knight*, 4 L. R. A. 453; *Batterman v. Albright*, 11 L. R. A. 800, 19 Am. St. Rep. 510; *Goodwin v. Smith*, 17 L. R. A. 284, 33 Am. St. Rep. 373; *Caldwell v. Alsop*, 17 L. R. A. 782; *Whithed v. St. Anthony Elevator Co.* 50 L. R. A. 254.

With the case of *Dickey v. Waldo*, 23 L. R. A. 449, is a comprehensive note on the sale or mortgage of future crops.

See *De Vaughn v. Howell*, 14 Am. St. Rep. 162, 166, for a note, Right of landlord to reserve title to or lien on crops to be raised by his tenant.

As to whether a lien of a chattel mortgage on growing crops continues after severance from the land, see *Gillilan v. Kendall*, 18 Am. St. Rep. 766, 770.

The authorities as to when growing fruit is real and when it is personal property are classified in a note to *Sparrow v. Pond*, 16 L. R. A. 103, s. c. 32 Am. St. Rep. 571, 575.

Rights of tenants in common to crops is the subject of a note to *Le Barron v. Babcock*, 9 L. R. A. 625, 19 Am. St. Rep. 488.—REPORTER.

For appellant there was a brief over the names of *Hiram F. Murdoch* and *J. W. Hamaker*, with an oral argument by *Mr. J. A. Jeffrey*.

For respondent there was a brief and an oral argument by *Mr. Geo. S. Nickerson*.

MR. JUSTICE BEAN delivered the opinion of the court.

The facts out of which this controversy arose are that in June, 1896, a decree was rendered in the Circuit Court for Klamath County foreclosing a real estate mortgage given by one John L. Hall to the plaintiff in November, 1894, under which the mortgaged premises were sold, and purchased by her on the first day of the following August, and she immediately entered into possession thereof. At the time of her purchase a crop of wheat was growing on the land, one-third of which belonged to Hall and the remainder to his tenant. The day before the sale, Hall gave a chattel mortgage on his interest in the crop to the Little Klamath Water Ditch Co. to secure a debt, and, after the grain had been harvested, the defendant, as president and superintendent of the company, entered on the premises, and by virtue of such mortgage took and carried away the wheat described in the complaint. The plaintiff thereupon commenced this action for its recovery, claiming to be the owner thereof by virtue of her purchase at the foreclosure sale, and, failing therein, she appeals.

The only question for our determination is whether the ditch company, under its chattel mortgage, or the plaintiff as purchaser, is entitled to Hall's interest in the grain growing on the land at the time of the sale under the foreclosure decree. Until foreclosure and sale, a mortgagor of real estate is entitled to the possession, rents, issues, and profits thereof. He has an absolute right to all an-

nual crops planted or owned by him, and, if they are severed before the sale, he is under no liability to account for them to the mortgagee or purchaser. But under the statute a purchaser at a foreclosure sale is entitled to possession of the premises from the day of sale, unless they are in the possession of a tenant holding under an unexpired lease, and in such case he is entitled to receive the rents or the value of the use and occupation thereof; and, if the annual crops are not severed from the soil prior to the sale, they pass, with the title, to the purchaser, as against the mortgagor and parties claiming an interest therein under him subsequent to the mortgage: 2 Jones, Mortg. § 1658; 1 Washburn, Real Prop. 144; Wiltsie, Mortg. Forec. § 587; 8 Am. & Eng. Enc. Law (2 ed.), 303; *Batterman v. Albright*, 122 N. Y. 484 (11 L. R. A. 800, and note, 25 N. E. 856, 19 Am. St. Rep. 510); *Heavilon v. Farmers' Bank*, 81 Ind. 249.

1. This is elementary law, and is not questioned by the defendant, but his contention is that the giving of the chattel mortgage to the ditch company by Hall, prior to the sale under the foreclosure decree, was a constructive severance of the growing crops. There is authority for such view (*Willis v. Moore*, 59 Tex. 628, 46 Am. Rep. 284; *White v. Pulley*, 27 Fed. 436), but it does not commend itself as the better one. The general rule of the common law is that growing crops form a part of the real estate to which they are attached, and follow the title thereto. They are, however, for many purposes, regarded as personal property, and subject to voluntary sale or mortgage by the owner (Reed, St. Frauds, § 708); but the right of a purchaser or mortgagee is subject to the contingency that it may be wiped out by a foreclosure and sale under a mortgage given by the vendor or mortgagor on the land before the crop was sown, unless it is severed from the soil prior to such sale: *Sherman v.*

Willett, 42 N. Y. 146. A real estate mortgage is not only a lien upon the land, but also upon the annual crops growing thereon, unless they belong to a tenant, subject only to the right of severance prior to the sale and entry under the mortgage: 1 Jones, Mortg. § 697; *Rankin v. Kinsey*, 7 Ill. App. 215. Unless there is an actual severance, the crops pass with the title to the soil to which they are attached as against the mortgagor, and a previous sale or mortgage by him will not constitute a severance as against a purchaser at the foreclosure sale. The test is whether there has been an actual severance. If so, the crops become personal property, and do not pass to him who purchases the land subsequent to the severance; if not, they go with the land: *Anderson v. Strauss*, 98 Ill. 485; *Shepard v. Philbrick*, 2 Denio, 172; *Crews v. Pendleton*, 1 Leigh, 297 (19 Am. Dec. 750, and note); *Beckman v. Sikes*, 35 Kan. 120 (10 Pac. 592); *Gillett v. Balcom*, 6 Barb. 370. It follows that the judgment of the court below must be reversed, and the cause remanded, with directions to enter a judgment in favor of the plaintiff.

REVERSED.

Decided 15 August, 1900.

ON PETITION FOR REHEARING.

For petitioner there was a brief over the name of *Mr. Chas. A. Cogswell*.

MR. JUSTICE MOORE delivered the opinion of the court.

2. At the rehearing of this case it was insisted that the court, in the former opinion, overlooked the fact that, when the premises were sold to the plaintiff, Hall's tenant was in possession thereof under a lease which did not terminate until three months thereafter; and, this being so, it is argued that plaintiff was not entitled to

the possession of the land, but, in lieu thereof, to receive from such tenant the rents or the value of the use and occupation of the premises from the time of such sale until the termination of the lease, and, it having been stipulated that the wheat hypothecated by Hall to the Little Klamath Water Ditch Company was due him at the time he executed the chattel mortgage, the judgment should have been affirmed. The case was tried by the court without the intervention of a jury, upon a stipulation of facts to the effect that on November 16, 1894, John L. Hall, being the owner of certain lands in Klamath County, Oregon, gave a mortgage thereon to the plaintiff, who, in June, 1896, secured a decree foreclosing the same, at which time the grain in question was growing on the premises; that on July 2, 1896, said land was levied upon by the sheriff of said county by virtue of an execution issued on said decree, of which fact the defendant had due notice; that on July 31, 1896, Hall, who then held the legal title to said land, of which he was in the constructive possession by Eugene Hammond, his tenant, under a lease thereof which did not terminate until November 1, 1896, gave a chattel mortgage on all his share of the crop of grain growing on said land to said ditch company, to secure the sum of \$355.50, payable October 1, 1896, which mortgage was duly filed within the time prescribed by law; that on August 1, 1896, the land was sold upon said execution to plaintiff, who was let into the immediate possession thereof, at which time the grain in question was growing thereon; that on October 9, 1896, the conditions of said chattel mortgage having been broken, the defendant, as president of the ditch company, against plaintiff's protest, took and carried away from said land one hundred and thirty-three bushels of wheat, of the value of \$78.30, which was the rental due Hall from Hammond under

the lease; and that on October 17, 1896, the plaintiff secured and now holds the possession of said grain.

The statute, in prescribing the person who is entitled to the possession of real property upon a judicial sale thereof, provides that the purchaser, from the day of sale until a resale or redemption, and a redemptioner from the day of his redemption until another redemption, shall be entitled to the possession of the property purchased or redeemed, unless the same be in the possession of a tenant holding under an unexpired lease, and in such case shall be entitled to receive from such tenant the rents or the value of the use and occupation thereof during the same period: Hill's Ann. Laws, § 307. It is stipulated that the grain so mortgaged by Hall was rental due from Hammond under the lease. "The word 'due,'" says Mr. Justice EWING, in *Scudder v. Scudder*, 10 N. J. Law, 340, "has more than one signification, or is used on different occasions to express distinct ideas. At times it signifies a simple indebtedness, without reference to the time of payment. '*Debitum in præsentì, solvendum in futuro.*' At other times it shows that the day of payment or render has passed." In *United States v. State Bank of North Carolina*, 31 U. S. (6 Pet.) 29, Mr. Justice STORY, in defining the word "due," says: "It is sometimes used to express the mere state of indebtedness, and then is an equivalent to 'owed' or 'owing;' and it is sometimes used to express the fact that the debt has become payable." In *Carr v. Thompson*, 67 Mo. 472, it was held that the word "due" was improperly used for "owing." As illustrating this definition, see, also, *Leggett v. Bank*, 25 Barb. 326; *Allen v. Patterson*, 7 N. Y. 476 (57 Am. Dec. 542). If it be assumed that the words "rental due," as used in the stipulation, are synonymous with "rent accrued," Hall could have entered and taken the quantity of wheat to which he was entitled, before it was harvested; but,

as such a method of securing the proper quantity would have been impracticable, we think that the parties meant by the use of that term that the wheat so taken by the defendant was the quantity which was ascertained to be due Hall after the grain was harvested and threshed. Having reached the conclusion that the rent was not due Hall until after the grain was harvested, which occurred after plaintiff purchased the land, but before she was entitled to the possession thereof, the rent of the premises was due her, and not Hall; for the rule is well settled that when land is leased in consideration of a part of the crop that may be raised thereon, and the lease does not contain any stipulation as to when such share is payable, it is due when the crop is harvested, or within a reasonable time thereafter: *Toler v. Seabrook*, 39 Ga. 14; *Lamberton v. Stouffer*, 55 Pa. St. 284; *Long v. Seavers*, 103 Pa. St. 517; *Brown v. Adams*, 35 Tex. 447. The rent thus reserved having accrued after the sale of the premises, the plaintiff was entitled to the same, and hence we are compelled to adhere to our former opinion.

REHEARING DENIED.

Argued 27 November; decided 17 December, 1900; rehearing denied 7 January, 1901.

STATE EX REL. v. HALL.

[83 Pac. 18.]

COUNTY COURT—CONTRACT TO COLLECT TAXES.

A county court being the general financial or business agent of the county, and charged with "the care and management" of its business and funds (Hill's Ann. Laws, § 896, subd. 9), may lawfully employ assistance in collecting delinquent taxes which cannot otherwise be collected, there being no interference with the duties of the sheriff, the tax collector: *Burness v. Multnomah County*, 37 Or. 460, distinguished.

From Marion: REUBEN P. BOISE, Judge.

Suit by the state, on the relation of Levi Herren, against W. W. Hall, County Clerk of Marion County, and another, to enjoin the delivery by the clerk and payment by

the Treasurer of Marion County of a warrant ordered to be issued by the county court to George G. Bingham on a claim presented by him for services in the collection of delinquent taxes. The facts are that in September, 1898, the county court employed Mr. Bingham to collect, or assist in the collection of, delinquent taxes for the years 1892, 1893, 1894, 1895, and 1896, and to take charge of the property theretofore bid in by the county judge on delinquent tax sales, and collect the amounts due thereon, or, when advisable, to recover the possession of the property by action or otherwise. At the time of making this contract the delinquent tax rolls for the years named were in the hands of the sheriff, but all collections thereon which could be enforced had been made, and there were no means of collecting any further or additional taxes by legal process. It was Mr. Bingham's duty, under his contract, to ascertain from the tax rolls the names of delinquent taxpayers, to learn their whereabouts, and to notify them personally or by letter of the amount of their taxes, and request them to call at the sheriff's office and pay the same, but he was not in any way authorized to interfere with the duties of that officer. For his services he was to receive fifteen per cent. on all taxes collected from the rolls of 1895 and 1896, and twenty per cent. on the amount collected from the other rolls. On January 6, 1899, he was allowed \$180.51 by the county court for the percentage due him on collections made in pursuance of his contract, and a warrant was ordered issued in his favor for the amount thereof. Before its delivery this suit was commenced, and a decree rendered in favor of the plaintiff, and the defendants appeal. REVERSED.

For appellants there was a brief over the name of *Brown, Wrightman & Myers*, with an oral argument by *Messrs. F. T. Wrightman and Wm. M. Ramsey*.

For respondent there was a brief over the names of *Samuel L. Hayden*, District Attorney, *R. J. Fleming*, *M. E. Pogue*, and *D. C. Sherman*, with an oral argument by *Mr. Fleming*.

MR. CHIEF JUSTICE BEAN, after stating the facts, delivered the opinion of the court.

The plaintiff bases its right to relief on the ground that the county court had no power or authority to enter into a contract with Mr. Bingham to collect, or to assist in the collection of, delinquent taxes. The argument is that by law the sheriff is made the tax collector of the county, and the county court cannot interfere with his duties. But, conceding this position, the contract in question does not attempt to interfere with the duties of the sheriff or any other officer. The county court by statute is made the general financial or business agent of the county, charged with "the care and management" of its business and funds (Hill's Ann. Laws, § 896, subd. 9), and to that end it may, unless prohibited by law, adopt such means as in its judgment may be proper or expedient to assist a county officer in the discharge of his duties: *Taylor v. Umatilla County*, 6 Or. 394; *Burnett v. Markley*, 23 Or. 436 (31 Pac. 1050); *Martin v. Whitman County*, 1 Wash. St. 533 (20 Pac. 599). And we can see no reason why it may not, if in its judgment necessary, employ some one to collect, or assist in collecting, taxes from delinquent taxpayers from whom payment could not be otherwise enforced. It was so held by the Supreme Court of Iowa, under a statute conferring upon the boards of county supervisors substantially the same powers as conferred upon the county courts of this state: *Wilhelm v. Cedar County*, 50 Iowa, 254. In that case it is said: "Now, because the statute does not expressly

authorize the board of supervisors to employ a special agent or attorney to assist in the collection of taxes not collectible by the county treasurer in the discharge of his duty, it does not follow that they may not have the implied power to do so. They have the power 'to represent their respective counties, and to have the care and the management of the property and business of the county in all cases where no other provision is made.'

* * * It is the business of the county to collect taxes, and to use all reasonable means to do it. We think, therefore, the board of supervisors had the power to employ the plaintiff to render the service in question." The decision in *Burness v. Multnomah County*, 37 Or. 460 (60 Pac. 1005), is in no way in conflict with this conclusion. In that case the contract between the county and Noble was held void because it undertook to interfere with the duties of the county clerk by stipulating how and from what data he should make delinquent tax rolls. But, as already said, in this case there was no attempt to interfere with the duties of the sheriff, but, rather, to give him assistance, in order that something might be realized on delinquent taxes which could not be collected by legal process. It follows that the decree of the court below must be reversed, and the complaint dismissed.

REVERSED.

Argued 14 February; decided 16 April, 1900.

ANDERSON v. PORTLAND FLOURING MILLS CO.

[50 L. R. A. 235, 60 Pac. 839.]

37	483
40	276
37	483
46	188

NEGOTIABILITY OF WAREHOUSE RECEIPTS—STATUTES.

1. A statute declaring that warehouse receipts shall be "negotiable, and may be transferred by indorsement of the party to whose order such receipts was given or issued, and such indorsement shall be deemed a valued transfer of the commodity represented by such receipt" makes such receipts negotiable, in the sense that a transfer thereof by indorsement carries the absolute title to the commodity represented by the receipt and protects a *bona fide* purchaser for value from unknown equities between the original parties: *State v. Koshland*, 25 Or. 178, cited.

NEGOTIABILITY OF WAREHOUSE RECEIPTS—PAROL EVIDENCE.

2. Section 4205 of Hill's Ann. Laws, declaring that warehouse receipts shall be negotiable and transferable by indorsement, does not render such receipts negotiable, so as to render parol evidence inadmissible, in an action on such receipts, to show that the firm issuing the same was in fact acting as agent. In that respect such receipts are still simple contracts.

ESTOPPEL TO CHANGE POSITION DURING TRIAL.

3. After a party has tried an action on a certain theory he cannot, on appeal, change his position and insist that his opponent has not performed some act that under the first position was immaterial. In other words, a party must be consistent throughout the trial and appeal. Thus, in an action for the value of wheat claimed to have been delivered to defendant for storage in its warehouse, where defendant denied such delivery and plaintiff's title and right to possession, it cannot, on appeal, claim that plaintiff's written tender of the amount due for charges, etc., was insufficient, and that the money should have been paid into court: *Wyatt v. Henderson*, 31 Or. 48, followed.

From Clackamas: THOS. A. MCBRIDE, Judge.

Action for conversion of wheat by J. F. Anderson against the Portland Flouring Mills Co. The defendant is a corporation engaged in the business of buying, selling, and storing wheat and manufacturing flour at Oregon City. During the years 1891, 1892, and 1893, John Gash, George Anderson, William McAlister, R. T. McNichols, J. P. Frizzell, and the plaintiff severally delivered wheat to W. E. Loughmiller & Co., at Switzerland and other stations on the Woodburn Branch of the Southern Pacific Railway, amounting in the aggregate to four thousand two hundred and fifty bushels, which by permission of the owners was shipped to the defendant, at Oregon City, for storage in its warehouse. Loughmiller

& Co. subsequently failed, and, being unable to replace the wheat or pay therefor, the claims of the respective parties were assigned to the plaintiff, who commenced this action to recover its value, on the theory that Loughmiller & Co., in receiving and shipping the wheat, were acting for and as the agents of the defendant, and it is therefore liable for their contracts. The complaint contains six causes of action, which are the same, except as to names, dates, and amounts. The first may therefore be used as a type of all. It alleges, in substance, that during the years 1891, 1892, and 1893, one John Gash, at the special instance and request of the defendant, did from time to time during such years, through Loughmiller & Co., its agents, ship from Switzerland, in Marion County, and deliver to the defendant at Oregon City, two thousand two hundred and sixty-three bushels of wheat; that such shipments were made, and wheat delivered to and received by defendant, subject to the conditions that defendant was to have the first privilege of purchasing the wheat for cash at any time Gash might desire to sell; that it should be subject to storage charges of two and one-half cents per bushel, and freight charges from the point of shipment; that upon demand, and the payment of freight, storage charges, and four cents per bushel for sacks, the defendant would deliver to Gash an equal number of bushels of good merchantable wheat, sacked; that in October, 1894, Gash, for a valuable consideration, assigned and transferred to the plaintiff all his claim to the wheat so shipped and delivered to the defendant; that after the assignment and transfer, and prior to the commencement of this action, the plaintiff duly notified defendant thereof, and demanded the wheat, accompanying the demand with an offer in writing to pay all freight and storage charges, and for sacks, but defendant refused

to deliver the wheat, and positively denied that plaintiff or Gash was entitled to the same, or any part thereof.

The defendant by its answer denies the receipt of the wheat as alleged in the complaint, and the contract therein set out, and, for an affirmative defense, avers that during the times mentioned Loughmiller & Co. were engaged in a general warehouse and storage business, bought and sold grain, and acted as agents for others in the sale thereof, at Silverton, Switzerland, and elsewhere, and during such time forwarded and sold grain to the defendant; that in the conduct of their business they received wheat from various persons, and, among others, from the plaintiff and his alleged assignors, upon the express condition and agreement that the identical wheat left with and received by them need not be returned, but the owner should have the privilege of returning a similar amount of the same quality of wheat instead, upon the payment of freight, storage charges, and four cents per bushel for sacks, as shown by receipts issued by Loughmiller & Co. to such persons; that, prior to any of the times stated in the complaint, the defendant entered into an agreement with Loughmiller & Co. for the purchase from and storage for them of wheat at its mills at Oregon City; that by such agreement it was expressly understood and agreed that the defendant was to deal solely and entirely with Loughmiller & Co., and they were not to be in any respect the agents of defendant in such transactions, or for any purpose whatever; that, from time to time, defendant purchased from Loughmiller & Co., under such agreement, large quantities of wheat, it being at the time ignorant as to the sources from which they received the same; that if any of the wheat received by it came from, or originally belonged to, the plaintiff, or any of his alleged assignors, it had no notice or knowledge thereof. The reply put in issue the allegations of the answer, and, the

trial resulting in a judgment for plaintiffs, the defendant appeals, assigning as error the admission of certain testimony, and the overruling of its motion for nonsuit.

AFFIRMED.

For appellant there was a brief over the name of *Williams, Wood & Linthicum*, with an oral argument by *Messrs. Geo. H. Williams and Stewart B. Linthicum*.

For respondent there was a brief over the names of *William Wallace Thayer and William H. Holmes*, with an oral argument by *Mr. Holmes*.

MR. JUSTICE BEAN, after stating the facts, delivered the opinion of the court.

1. To support the first, third and sixth causes of action, the plaintiff introduced in evidence five warehouse receipts, dated at Silverton, Oregon, and signed by W. E. Loughmiller & Co., and was permitted, over defendant's objection and exception, to give evidence *aliunde* the receipts, tending to prove that Loughmiller & Co., in signing and issuing them, were acting as the agents of defendant, and that such receipts were in fact the contracts of the defendant. The admission of this evidence constitutes the first assignment of error upon which the defendant relies for a reversal of the judgment. The wheat receipts referred to are identical, except as to dates, names and amounts, and it will be sufficient for the purposes of this appeal to set forth one of them. It is as follows :

"No 1.

SILVERTON, Or., Sept. 7, 1891.

"Received from John Gash one thousand two hundred and ninety-four 40-60 bushels of good, merchantable wheat, to be forwarded to Oregon City, Oregon, and stored with the Portland Flouring Mills Co., subject to

the following conditions: W. E. Loughmiller & Co. are to have the first privilege of purchasing this wheat for cash at any time the storer concludes to sell, and said wheat is subject to storage charges of two and one-half cents per bushel, and freight charges from shipping [point] to Oregon City. Upon demand, this quantity of good, merchantable wheat will be delivered to the storer, sacked, upon the payment of the above-mentioned storage and freight charges, and four cents per bushel for sacks; but no order of storer will be accepted by the Portland Flouring Mills Co. unless countersigned by W. E. Loughmiller & Co. But in no case shall W. E. Loughmiller & Co., or the Portland Flouring Mills Co., be held liable for accidental loss or damage to said wheat by the action of the elements.

“W. E. LOUGHMILLER & Co.

“Per J. A. L.”

“1,294 40-60 bushels.”

1. The defendant's contention is that, since warehouse receipts in this state are by statute made negotiable, the rule of law that the liability of a party upon a negotiable instrument must be established by the terms of the writing itself, and cannot be shown by evidence *aliunde*, is applicable to such receipts. It may be regarded as a settled rule of the common law that, if the person sought to be charged upon a negotiable instrument is not bound upon the face of the writing, he is not bound at all, and it cannot be shown that the maker was in fact the agent of another, and that such other is bound by the instrument.

The observation of ANDREWS, J., in *Briggs v. Partridge*, 64 N. Y. 357 (21 Am. Rep. 617), that “persons dealing with negotiable instruments are presumed to take them on the credit of the parties whose names appear upon them, and a person not a party cannot be charged upon proof that the ostensible party signed or indorsed as his agent,” is a clear statement of the law, and supported by

the authorities : *Chitty, Bills & N.*33* ; *Heaton v. Myers*, 4 Colo. 59 ; *Arnold v. Sprague*, 34 Vt. 402 ; *Stackpole v. Arnold*, 11 Mass. 27 (22 Am. Dec. 150) ; *Bedford Ins. Co. v. Covell*, 8 Metc. (Mass.) 442 ; *Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 101 ; *Rendell v. Harriman*, 75 Me. 497 (46 Am. Rep. 421) ; *De Witt v. Walton*, 9 N. Y. 571 ; *Robinson v. Kanawha Valley Bank*, 44 Ohio St. 441 (58 Am. Rep. 829, 8 N. E. 583). But this rule is, in our opinion, confined to commercial contracts, which represent, and, in a measure, pass as money,—such as bills of exchange and promissory notes. Parol evidence is not admissible to charge an unnamed principal on such an instrument ; for, in the language of the authorities, a note or bill of exchange “ ‘is a courier without luggage,’ whose countenance is its passport :” 1 Daniel, Neg. Inst. (4 ed.) § 303. And as said in an early case on the question : “It would be of dangerous consequence to trade to admit of evidence arising from extrinsic circumstances. * * * A bill of exchange is a contract, by the custom of merchants, and the whole of that contract must appear in writing :” *Thomas v. Bishop*, 2 Strange, 955. Mr. Daniel, in the section already cited, says : “The rule excluding parol evidence to charge an unnamed principal as a party to negotiable paper is derived from the nature of such paper, which, being made for the purpose of being transferred from hand to hand, and of giving to every successive holder as strong a claim upon the original party as the payee himself has, must indicate on its face who is bound for its payment ; for any additional liability not expressed in the paper would not be negotiable.” Section 4205 of Hill’s Ann. Laws provides that “all checks or receipts given by any person operating any warehouse, commission house,” etc., “are hereby declared negotiable, and may be transferred by indorsement of the party to whose order such check or receipt was given or issued, and such

indorsement shall be deemed a valid transfer of the commodity represented by such receipt, and may be made either in blank or to the order of another." By this statute, a warehouse receipt, regardless of its form, is made negotiable, in the sense that a transfer thereof by indorsement carries the absolute title to the commodity represented by the receipt, and a *bona fide* purchaser for value is not chargeable with knowledge of any notice of any equities between the original parties, as in case of the assignment of an ordinary chose in action: *State v. Koshland*, 25 Or. 178 (35 Pac. 32); *Bishop v. Fullkerth*, 68 Cal. 607 (10 Pac. 122); *Price v. Wisconsin Fire Ins. Co.* 43 Wis. 267; *First Nat. Bank v. Dean*, 137 N. Y. 110 (32 N. E. 1108); *First Nat. Bank v. Boyce*, 78 Ky. 42 (39 Am. Rep. 208); *Collins v. Rosenham* (Ky.), 43 S. W. 726.

2. But the statute does not give to such receipts all the attributes of negotiable paper. A transfer of the receipt by indorsement may operate, under the statute, to transfer and vest the title of the goods in the purchaser, where before it would not, but the nature of the contract itself is unchanged. It is in no sense a negotiable instrument under the law merchant. It is simply a written acknowledgment by the warehouseman that he has received, and holds in store for the depositor, the amount and description of property named in the receipt, upon the terms and conditions therein stated, and is nothing more than a written contract between the parties, which by the statute is made negotiable for certain purposes. The word "negotiable" is evidently not used in the statute in the sense in which it is ordinarily applied to bills of exchange and promissory notes.

A very satisfactory case upon this subject is *Shaw v. Railroad Co.* 101 U. S. 557. In that case the question was as to the right of a purchaser from a thief, for value, and without notice, of a bill of lading issued in Missouri

for goods to be carried to Pennsylvania, and which by the statutes of both states was made negotiable. In considering the question, it did not appear necessary to inquire whether the statute of Missouri or of Pennsylvania should be regarded as affecting the contract, since, in the opinion of the court, there was no substantial difference between the statutes of the two states in that regard. The language of the Pennsylvania statute was, they (bills of lading) "shall be negotiable and may be transferred by indorsement and delivery," while that of Missouri was, "they shall be negotiable by written indorsement thereon and delivery in the same manner as bills of exchange and promissory notes." But neither statute undertook to define the effect of such a transfer, and it therefore became necessary for the court to look outside of them to learn what the legislature meant by declaring such instruments "negotiable." After defining that term, as applied to contracts, to mean primarily the capability of being transferred by indorsement and delivery, so as to give to the indorsee a right to sue thereon in his own name, and pointing out that certain consequences generally, though not always, follow the indorsement or transfer of bills and notes,—such as the liability of an indorser and the rights of a *bona fide* purchaser before maturity and from a finder or thief,—it says: "But none of these consequences are necessary attendants or constituents of negotiability. That may exist without them. A bill or note past due is negotiable, if it be payable to order or bearer, but its indorsement or delivery does not cut off the defenses of the maker or acceptor against it, nor create such a contract as results from an indorsement before maturity, and it does not give to the purchaser of a lost or stolen bill the rights of the real owner. It does not necessarily follow, therefore, that, because a statute has made bills of lading negotiable by indorsement and de-

livery, all these consequences of an indorsement and delivery of bills and notes before maturity ensue or are intended to result from such negotiation."

Again, after observing that bills of exchange and promissory notes are exceptional in their character, pass from hand to hand as coin, and the interests of trade require that a *bona fide* purchaser for value should not be bound to look beyond the instrument, the court proceeds: "The reason can have no application to the case of a lost or stolen bill of lading. The function of that instrument is entirely different from that of a bill or note. It is not a representative of money, used for the transmission of money, or for the payment of debts or for purchases. It does not pass from hand to hand as bank notes or coin. It is a contract for the performance of a certain duty. True, it is a symbol of ownership of the goods covered by it—a representative of those goods. But, if the goods themselves be lost or stolen, no sale of them by the finder or thief, though to a *bona fide* purchaser for value, will divest the ownership of the person who lost them, or from whom they were stolen. * * * Bills of lading are regarded as so much cotton, grain, iron, or other articles of merchandise. The merchandise is very often sold or pledged by the transfer of the bills which cover it. They are, in commerce, a very different thing from bills of exchange and promissory notes, answering a different purpose and performing different functions. It cannot be, therefore, that the statute which made them negotiable by indorsement and delivery, or negotiable in the same manner as bills of exchange and promissory notes are negotiable, intended to change totally their character, put them in all respects on the footing of instruments which are the representatives of money, and charge the negotiation of them with all the consequences which usually attend or follow the negoti-

ation of bills and notes. Some of these consequences would be very strange, if not impossible; such as the liability of indorsers, the duty of demand *ad diem*, notice of nondelivery by the carrier, etc., or loss of the owner's property by the fraudulent assignment of a thief. If these were intended, surely the statute would have said something more than merely make them negotiable by indorsement."

We are of the opinion, therefore, that a warehouse receipt is not negotiable, within the meaning of the rule prohibiting the admission of parol testimony to charge one not bound upon the face of the instrument, but in that respect it is a simple contract, and such evidence is admissible to show that, although executed by and in the name of an agent, it is in fact the contract of the principal, and he is bound thereby: *Barbre v. Goodale*, 28 Or. 465 (38 Pac. 67, 43 Pac. 378).

It is contended, however, that, even if the receipts are not negotiable, they are nevertheless presumptively the contract of Loughmiller & Co. alone, and plaintiff cannot recover upon either the first, third, or sixth cause of action, for the reason that there was no evidence to rebut such presumption, or to show that Loughmiller & Co. were in fact defendant's agents. A considerable portion of defendant's brief is devoted to the discussion of this question, which we regard, however, as one of fact for the jury, and not the court. There was evidence given at the trial on behalf of plaintiff, tending to show, and from which the jury were justified in finding, that Loughmiller & Co. were in fact the agents of defendant, and received the wheat and executed the receipts as such. It is unnecessary for us to incumber this opinion by a reference to the testimony in detail. It is sufficient to say that we have examined it with much care, and are satis-

fied that the court committed no error in overruling the motion for nonsuit on this ground.

It is next claimed that plaintiff cannot recover upon the second, fourth, and fifth causes of action,—those representing the claims of Frizzell, McNichols, and McAlister,—because of a failure of proof. The evidence offered to establish these several causes of action consisted of load checks, and the oral testimony of witnesses that the wheat was received upon the same terms and conditions, and under the same contract, as that of the other parties. The load checks are all substantially the same. The following may serve as a specimen :

“No. 56. Aug. 23. ———, Or., ———, 1893.

Received by R. T. McNickle, by W. E. Loughmiller & Co., for the Portland Flouring Mills Co., ——— bushels, 3,835 lbs., good merchantable wheat, to be forwarded to Oregon City, and there stored in the P. F. M. Co.’s warehouses for the benefit of the owner. No. of sacks returned, 20 sacks.

W. E. LOUGHMILLER,
Weigher.”

It is claimed that these load checks constitute the contract under which the wheat was received by Loughmiller & Co., and that they do not support the allegations of the complaint. But the evidence shows that when a farmer delivered a load of grain it was the custom to give him a load check as an evidence thereof, and when he completed his season’s hauling a receipt was issued for the entire amount of grain delivered, in form the same as the one heretofore set out, and hence the load checks do not evidence the contract under which the wheat was received, but are simply memoranda of each load of wheat as it was delivered ; and so parol evidence to the effect that the wheat represented in the second, fourth, and fifth

causes of action was delivered and received under the same contract as in the case of the other parties was competent.

Next it is claimed that plaintiff cannot recover upon any of the causes of action, because, if defendant is under any liability to plaintiff, it is in tort, and not contract. This contention is based upon the theory that Loughmiller & Co. were not the agents of defendant. But, as we have already seen, there was, in our opinion, sufficient evidence to carry that question to the jury, and hence this position is without merit.

3. It is next contended that the payment or tender of storage, freight, and sack charges was a condition precedent to the right to maintain this action, and the written tender was not sufficient, but the money should have been paid into court. The defendant, by its answer, denies the contract alleged in the complaint, and the plaintiff's title and right to the possession of the wheat in controversy, and expressly puts its refusal to deliver upon the ground that neither plaintiff nor his assignors ever shipped or delivered to it any wheat whatever; and therefore it cannot now be permitted to say that its refusal to deliver the grain was on account of the failure of plaintiff to pay the charges referred to: *Wyatt v. Henderson*, 31 Or. 48 (48 Pac. 790). This disposes of all the questions raised on the appeal, and, finding no error in the record, the judgment is affirmed.

AFFIRMED.

Argued 20 February; decided 23 April, 1900.

ABRAHAM v. OREGON & CALIFORNIA R. R. CO.

[60 Pac. 890, — L. R. A. —, 12 Am. & Eng. R. R. Cas. (N. S.) 250.]

PAROL EVIDENCE TO EXPLAIN COMMON WORDS.

1. Where a deed to a railroad company conveyed land "for all legitimate railroad, depot, and warehouse purposes," parol evidence of the understanding of the parties at the time the instrument was executed is not admissible to show that the words "legitimate railroad purposes" were used with a particular or special meaning. Being ordinary and usual words, no peculiar signification can be attached to them by parol evidence.

RAILROAD PURPOSES*—HOTEL AND EATING HOUSE.

2. A railroad company may under some circumstances conduct hotels or eating houses in connection with and as a necessary part of its railroad business, and their maintenance would be a legitimate railroad purpose; but whether a certain hotel or eating house is maintained for such purpose is a mixed question of law and fact that ordinarily requires testimony for its determination.

From Douglas: J. W. HAMILTON, Judge.

Suit by Sol Abraham against the Oregon & California Railroad Co. and others to enjoin maintenance of a hotel and diversion of water, and for damages. The first cause of suit, in substance, is that on the twenty-eighth of February, 1883, the plaintiff and W. R. Willis conveyed to the defendant, the Oregon & California Railroad Co., certain premises described in the complaint, by an ordinary warranty deed, the *habendum* clause of which is as follows: "To have and to hold the same, with all the privileges and appurtenances thereto belonging, to the said railroad company, its successors and assigns, forever, for the purpose of building and maintaining a railroad thereon, and to use the same for all legitimate railroad, depot, and warehouse purposes." At the time of the execution of the deed the plaintiff and Willis were the owners of a large tract of land at what is now known as "Glendale," in Douglas County, and adjoining the

*NOTE.—This case has been republished in 12 Am. & Eng. R. R. Cas. (N. S.) 250, with a note on the power of railroad companies to acquire land for railroad purposes, and what are and what are not such purposes.—REPORTER.

37	495
87	512

37	495
41	551
41	552

land conveyed to the railroad company, which they subsequently laid off and platted as a town ; and soon thereafter the plaintiff, who, in the mean time, had succeeded to Willis' interest, constructed and built thereon a hotel adequate to the wants and conveniences of the passengers of the defendant company, the traveling public and the local custom. Thereafter, and on or about the first of July, 1887, the Oregon & California Railroad Co. leased to the defendant, the Southern Pacific Co., all its railroad and railroad properties in the State of Oregon, including the depot grounds at Glendale, and on or about the first of August, 1887, the Southern Pacific Co. leased to the defendant Clarke a portion of the land conveyed to the Oregon & California Railroad Co. by the deed of February 28, 1883, "and has caused, procured and suffered said defendant Clarke to erect thereon a hotel for the accommodation of the general public, and incidentally as an eating house for the passengers upon the trains of the Southern Pacific Co., and the said defendant Clarke is now, and ever since to the first day of October, 1897, has been carrying on and conducting upon the said leased premises a hotel for the accommodation of the traveling public and local custom ; the said Southern Pacific Co. having caused, procured and suffered a hotel building to be erected and maintained upon said leased premises for that purpose ; that the principal business of said hotel and eating house so erected and maintained is the local custom and patronage of an ordinary and general hotel incident to the town of Glendale ; that it derives some support from the passengers of the Southern Pacific Co., but said support is not its principal business ; that the trains of said Southern Pacific Co. do not stop at said station of Glendale regularly for meals, and have never done so since the erection of said hotel, and but rarely stop for meals, and then only when its trains

are at least one and one-half hours late; that the said Southern Pacific Co. has a regular eating station and eating house at Ashland, Oregon, sufficient to accommodate its passengers, and it is not necessary, and does not add to the convenience of its passengers, to have one at Glendale; that, by reason of the construction and operation of said hotel and eating house upon said depot grounds by the defendant, as hereinbefore set out, the hotel of plaintiff is rendered practically valueless for the purposes for which it was constructed." It is averred that at the time of the execution of the deed to the railroad company it was expressly understood and agreed by and between the parties thereto that the words "legitimate railroad, depot, and warehouse purposes," as used therein, should not mean or indicate a hotel or eating house, and such deed was made and accepted with the understanding that the premises conveyed should be limited in their uses, and were not granted for the purpose of building or maintaining either an eating house or hotel thereon; that the defendants, the Southern Pacific Co. and Clarke, had full notice and knowledge of the claim of plaintiff relative thereto at the time the lease was made, and the hotel or boarding house constructed.

For a further and separate cause of suit the complaint alleges, in substance, that on or about the second day of May, 1883, the legal title to certain lands near the depot grounds referred to was in Willis, although plaintiff was the owner of an undivided half thereof; that, at the date referred to, Willis and his wife, by an instrument in writing, conveyed to the Oregon & California Railroad Co. the right to take from a certain stream on the premises owned by the plaintiff and Willis all the water that would flow through a three-inch pipe from a certain designated point to the water tank of the railroad company, in con-

sideration of which the company granted to Willis and his assigns the right to tap the tank by a pipe three inches in diameter, and to thereby take all the water therefrom, beyond the amount needed by the defendant corporation to supply its locomotives; that on or about the eighth of May, 1885, the plaintiff purchased and succeeded to all the rights of Willis in and to the premises referred to, and all his rights under such agreement; that on or about the first of November, 1897, the defendants, the Southern Pacific Co. and Clarke, caused a pipe to be laid and connected with the water tank referred to, and thereby conducted the water to the hotel built upon the depot grounds, and ever since such time have been, and now are, using the water from said tank, to plaintiff's damage in the sum of \$250. The complaint concludes with a prayer for a decree enjoining and restraining defendants from carrying on or permitting to be carried on the eating house or hotel referred to, and from using from the water tank described any other or greater amount of water than necessary to supply the locomotives of the defendant railroad company. A demurrer to the complaint was sustained and plaintiff appealed.

REVERSED.

For appellant there was a brief over the names of *Dolph, Mallory & Simon, Albert Abraham, and J. C. Fullerton*, with an oral argument by *Messrs. Abraham and Fullerton*.

For respondents there was a brief over the names of *Fenton, Bronaugh & Muir and Willis & Rice*, with an oral argument by *Mr. William T. Muir*.

MR. JUSTICE BEAN, after stating the facts, delivered the opinion of the court.

This is not a suit to correct or reform a deed, and hence there are but two questions for decision on this appeal—first, whether, under the allegation that, at the time the deed was made by the plaintiff and Willis to the Oregon & California Railroad Co., it was understood and agreed that the words “for all legitimate railroad, depot, and warehouse purposes” should not mean or include a hotel or eating house, plaintiff is entitled to an injunction restraining the defendants from maintaining a hotel on the premises conveyed, because in violation of the terms of the grant; and, second, if not, whether the hotel constructed and now maintained by the defendants the Southern Pacific Co. and Clarke is for “legitimate railroad purposes.” Considerable discussion was had at the argument as to whether the deed in question conveyed to the railroad company the fee of the land therein described, or a mere easement therein. But, for the purposes of this appeal, that question is immaterial. In any event, the grant was for legitimate railroad, depot, and warehouse purposes only: *Breckinridge v. Delaware, etc. R. R. Co.* (N. J. ch.) 33 Atl. 800; *Robinson v. Missisquoi R. R. Co.* 59 Vt. 426 (10 Atl. 522); *Thornton v. Trammell*, 39 Ga. 202.

1. We come, then, directly to a consideration of the question as to whether parol evidence is admissible to show that the words “legitimate railroad purposes” were used in the deed in a particular sense.* It is an

* NOTE.—Section 662 of Hill's Ann. Laws, reads as follows: “When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be, between the parties and their representatives or successors in interest, no evidence of the terms of the agreement, other than the contents of the writing, except in the following cases: (1) Where a mistake or imperfection of the writing is put in issue by the

elementary rule of law that parol evidence cannot be admitted to contradict or vary a written instrument; and it is equally well settled that parol evidence may not be given to show that common words, the meaning of which is plain, and which do not appear from the context to have been used in a peculiar sense, were in fact so used. Mr. Greenleaf, after stating the rule that parol evidence is always receivable to define and explain the meaning of words in a contract which are purely technical or local, or which have two meanings—the one common and universal, and the other technical or local—or where words and phrases are used in a peculiar sense by members of a particular religious sect, says: “But beyond this the principle does not extend. If, therefore, a contract is made in ordinary and popular language, to which no local or technical and peculiar meaning is attached, parol evidence, it seems, is not admissible to show that in that particular case the words were used in any other than their ordinary and popular sense:” 1 Greenleaf, Ev. (15 ed.) § 295.

And Lord Chief Justice TINDALL says: “The general rule I take to be that where the words of any written instrument are free from ambiguity* in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves, and that in such case evidence *dehors* the instrument, for the purpose of explaining it according to the surmised or alleged intention

pleadings; (2) where the validity of the agreement is the fact in dispute. But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates as defined in section 686, or to explain an ambiguity, intrinsic or extrinsic, or to establish illegality or fraud.” * * *

of the parties to the instrument, is utterly inadmissible. If it were otherwise, no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking under it; for the ablest advice might be controlled, and the clearest title undermined, if at some future period parol evidence of the particular meaning which the party affixed to his words, or of his secret intention in making the instrument, or of the objects he meant to take benefit under it, might be set up to contradict or vary the plain language of the instrument itself." *Shore v. Wilson*, 9 Clark & F. *355, *565. And Mr. Justice CLIFFORD, in *Moran v. Prather*, 90 U. S. (23 Wall.) 492, 501, 23 L. Ed. 123, speaking in reference to the same subject, says: "Ambiguous words or phrases may be reasonably construed to affect the intention of the parties, but the province of construction, except when technical terms are employed, can never extend beyond the language employed, the subject-matter, and the surrounding circumstances." It is, therefore, not competent for either of the parties to a contract, where its language is plain and unambiguous, to prove by parol evidence how it was understood, or the meaning of the words used: 1 Rice, Ev. 250; *Kemble v. Lull*, 3 McLean, 272 (Fed. Cas. No. 7683); *Davis v. Shafer* (C. C.), 50 Fed. 764. Applying this rule to the case in hand, it is clear that the plaintiff cannot show by parol testimony that the deed from himself and Willis to the railroad company was not intended to, and did not, convey to such company the right to use the property for all legitimate railroad purposes.

2. It is claimed, however, on behalf of the plaintiff, that the hotel is not a legitimate or proper railroad purpose, because it is used for the accommodation of the general public, and not for the passengers and employees of the railroad company. The erection and maintenance

by railway companies of hotels or eating stations at suitable and convenient places along their roads for the use and accommodation of their employees and passengers is not only a legitimate and proper railroad use, but almost, if not quite, a necessity, in many instances, of modern railway travel. A railway company has an undoubted right to use its property in any way the exigencies of its business or the convenience or accommodation of its passengers may require or suggest: *Gudger v. Richmond, etc. Ry. Co.* 106 N. C. 481 (43 Am. & Eng. R. R. Cas. 606, 11 S. E. 515); *Western Union Tel. Co. v. Rich*, 19 Kan. 517 (27 Am. Rep. 159); *Gurney v. Minneapolis, etc. Elev. Co.* 63 Minn. 70 (30 L. R. A. 534, 65 N. W. 136); *Illinois, etc. R. R. Co. v. Wathen*, 17 Ill. App. 582. And, in cases where hotels or eating houses appear to be reasonably necessary for the convenience of its employees and passengers, their maintenance is a legitimate railroad purpose. But an eating house or hotel kept for the accommodation of the general public, and not as an incident to the operation and management of the railway, cannot be so considered. As to whether a given hotel or eating house is maintained for railroad purposes is therefore largely a mixed question of law and fact, to be determined from the circumstances of each particular case. The question as to when and under what circumstances a hotel is a necessary or legitimate railroad use or purpose is quite fully considered in *Milwaukee & St. P. Ry. Co. v. Board of Sup'rs of Crawford County*, 29 Wis. 116; *Milwaukee & St. P. Ry. Co. v. City of Milwaukee*, 34 Wis. 271; *Chicago, M. & St. P. Ry. Co. v. Board of Sup'rs of Crawford County*, 48 Wis. 666 (5 N. W. 3), and, within the doctrine of these cases, we are of the opinion that, under the allegations of the complaint, the operation of the hotel in question cannot be held, as a matter of law, to be a "legitimate railroad purpose," and within the terms of the grant from

the plaintiff, because it is alleged that it is not necessary, and does not add to the comfort, convenience, or safety of the railway passengers, but is for the accommodation of the general public. It seems to us, therefore, the demurrer should be overruled, and the case tried upon its merits, so that the court, aided by the testimony, can determine whether the hotel is in fact a legitimate railroad purpose.

But little need be said in reference to the second cause of suit. The complaint does not show any injury to the plaintiff by the alleged violation of the contract pleaded. It is nowhere alleged that he ever attempted to avail himself of the right given by the contract, although a period of sixteen years has elapsed since its execution; nor is it averred that he has any use for the water, or is damaged or injured in any way by its alleged diversion. It follows that the decree of the court below must be reversed, the demurrer overruled, and the cause remanded for further proceedings consistent with this opinion, and it is so ordered.

REVERSED.

Decided 11 June; rehearing denied 18 August, 1900.

TALLMADGE v. HOOPER.

[61 Pac. 349, 1127.]

37	503
42	238

TIME ALLOWED FOR FILING TRANSCRIPT.

1. The expression "time allowed to file the transcript," used in Hill's Ann. Laws, § 541, subd. 2, as amended (Laws, 1899, p. 227, § 2, subd. 2), providing the time within which a transcript must be filed in the supreme court, means the original thirty days allowed by the statute and any extension thereof that may have been granted; but each extension must be secured before the previous one has expired.

APPEAL—CERTIFICATION OF TESTIMONY BY JUDGE.

2. Under Section 815 of Hill's Ann. Laws, the only cases in which the judge who heard the testimony need certify it for the purpose of appeal are those tried before referees.

PAROL EVIDENCE TO VARY WRITING—PATENT AMBIGUITY.

3. In a suit involving a written lease of a ditch, providing that the lessee shall make a certain payment of rent thirty days after he shall commence using the

waters of such ditch in placer mining, it cannot be shown by parol evidence that such payment was to be made at another time; first, because it is an attempt to vary by parol the terms of an unambiguous writing, and, second, if it is ambiguous, the ambiguity is patent and not latent, and cannot be explained by extrinsic evidence.

From Union : ROBERT EAKIN, Judge.

This is a suit by L. W. Tallmadge against A. B. Hooper and others to enjoin the prosecution of mining operations on, and to declare forfeited and canceled a lease of, mining ground. The facts are that on April 13, 1899, the plaintiff leased to defendants certain placer mining ground which she owned in Union County, a ditch or canal known as "Sparta Canal," the water rights and lateral ditches belonging thereto, and the use of the waters thereof, for the mining season of that year. The ditch is about thirty miles long, and has its source high up in Eagle Creek Mountains, some fifteen or twenty miles from the town of Sparta. During the winter season it becomes obstructed, so that it is necessary to clean out and repair it in the spring before it can be used to convey water for mining purposes, it being customary to begin at the lower end of the ditch and proceed towards its source as rapidly as the season will permit, in the mean time using such surface water from melting snow and local feeders for mining purposes as can be diverted into the ditch. The lease is in writing, and the parts material on appeal are as follows: "First—That upon the execution of this agreement the parties of the second part (Hooper and J. W. Newton) shall be entitled to the possession of the above-mentioned properties, excepting the part hereinabove reserved, for the purpose of cleaning out the ditches and preparing the placer mining ground for the mining season for the year 1899. Second—The parties of the second part shall commence cleaning out the said Sparta Canal, and the lateral ditches thereto and therefrom, as

soon as the season has so far advanced that it will permit the work to be done in an economic manner, and finish the work of cleaning out said ditch and repairing the flumes, and have the water running there through, onto the said mining premises, not later than the fifteenth day of June, 1899. * * * Fourth—The parties of the second part shall pay to the party of the first part (plaintiff), at the town of Sparta, \$500.00 legal money of the United States within thirty days after they shall commence using the giants or the waters of said canal in placer mining said mining grounds. Sixty days after said payment, the further sum of \$1,000.00 legal money of the United States. And an additional sum of \$1,500.00 at the close of the mining season for the year 1899, when the final clean up is made. * * * Time and the complete performance of all the covenants herein contained is of the essence of this agreement; and, in case default shall be made in any of the covenants or agreements as herein provided for, as soon as said default is made the party of the first part, or her duly authorized agent, may re-enter said premises, or any part thereof, in the name of the whole, and repossess herself of her former estate therein, and all work done and all payments made shall be forfeited by the parties of the second part to the party of the first part as rent and liquidated damages, and these presents shall become null and void."

Immediately upon the execution of the lease, the defendants entered into possession of the property, and proceeded to clean out and repair the ditch, so that on May 3 they commenced using the giants, with water therefrom, in mining on the leased premises, and had a full head of water thereafter, although the ditch was not opened its entire length until about July 6. They made the first payment on the rent, but failed and neglected to make the second when it became due, according to the

plaintiff's interpretation of the lease; and on August 25, after repeated demands, she notified them that she elected to declare the lease forfeited, and to re-enter and take possession of the demised premises, which she attempted to do, but they refused to surrender possession, and continued thereafter to clean up the bedrock and pipe down the races on the mining premises. This suit was thereupon commenced, and the defendants were temporarily enjoined from further mining or trespassing upon the premises in question. The complaint sets out the lease in full, and alleges divers and sundry breaches thereof, but the only one necessary for us to consider is defendants' alleged failure to make the second payment of rent in accordance with the terms of their agreement. The answer admits the execution of the written contract, as set out in the complaint, but alleges that it was the understanding and agreement that the first payment of \$500 rental should not become due or payable until thirty days after defendants began to use water flowing through the canal from the source thereof; and on the trial they were permitted to give evidence tending to show, and the court found, that, at the time the written contract was entered into, it was understood and agreed between the parties that the maturity of the first payment should not be counted or computed from the commencement of the use of surface water through the canal, but from the use of the water through its entire length, provided that on no account should the first payment be deferred later than the fifteenth of July, and that, by reason of such fact, the second payment of \$1,000 did not become due or payable until the thirteenth of September, and hence there was no breach of the contract at the time of plaintiff's re-entry or the commencement of this suit. The court thereupon found that defendants were entitled to damages on account of the wrongful bringing of the suit,

and proceeded to assess the same at \$1,208.75, by charging the plaintiff with the entire expense for labor incurred by the defendants in operating the mine from April 20 to the thirtieth of August, the \$500 paid as rental, the amount expended by them for supplies for boarding house and other incidentals, and the value of their services during the same time, and crediting them with the amount of gold taken out of the mine. From this decree the plaintiff appeals, claiming that the court erred in admitting oral testimony contradicting or varying the terms of the written contract, and in assuming to assess damages on account of the wrongful issuance of the injunction.

REVERSED.

For appellant there was a brief over the names of *Smith & Heilner* and *Frank L. Moore*, with an oral argument by *Mr. William Smith* and *Mr. Moore*.

For respondent there was a brief and an oral argument by *Mr. Thos. H. Crawford*.

MR. JUSTICE BEAN, after stating the facts, delivered the opinion of the court.

Before considering the merits, it is necessary to dispose of two questions of practice. The appeal was perfected on the twenty-second of January, 1900. On February 15 an order was made by the court below extending to the first of April the time in which to file the transcript. On March 31, upon an application by plaintiff, and after notice to the defendants, the time was further extended until the fifteenth of April, within which time the transcript was filed. The defendants move to dismiss the appeal because (1) the application for the second extension of time was not sufficient to justify the court in making the order, and (2) such order is void for want of authority.

1. Hill's Ann. Laws, § 541, subd. 2, as amended (Laws, 1899, p. 227), provides that the appellant shall, within thirty days after the appeal is perfected, file with the clerk of the appellate court a transcript or such an abstract as the rules of the court may require, of so much of the record as may be necessary to intelligibly present the questions to be decided, together with copies of certain portions of the original record, and, if the transcript or abstract is not so filed, the appeal shall be deemed abandoned, and the effect thereof terminated; but the trial court or judge thereof, or the supreme court or a justice thereof, is authorized, upon such terms as may be just, to enlarge the time; but "such order shall be made within the time allowed to file the transcript, and shall not extend it beyond the term of the appellate court next following the appeal." So far as the first objection is concerned, it is sufficient to say that it was a matter within the sound discretion of the trial judge, with the exercise of which this court will not interfere except in case of a manifest abuse thereof, which has not occurred in this instance.

In support of the second contention, it is argued that while the trial court or judge thereof, or the supreme court or a justice thereof, is authorized to enlarge the time for filing a transcript on appeal, such order can be made only within the thirty days allowed to file the transcript. But this does not impress us as the better view. The provision of the act of 1899 for the extension of time in which to file the transcript is simply a copy of the statute upon the subject as it had been in force for many years, under which, as we understand it, the practice has been, upon a proper showing, to make an order for such extension at any time before the appellant is in default; and this, in our opinion, is the proper construction of the statute. The "time allowed to file the transcript," within

the meaning of the law, is the thirty days provided by statute, or such an extension thereof as may have been granted. Therefore the motion to dismiss must be overruled.

2. The defendants also move to strike from the files what purports to be the testimony taken in the court below, and upon which the trial was had. The suit was tried before the court without a referee, and the testimony taken by the official reporter, which he subsequently (presumably upon the plaintiff's request) transcribed, certified to, and filed with the county clerk, who certifies it to this court as the testimony and exhibits in the case as filed in his office. The defendants claim that the testimony should have been identified by the certificate of the trial judge, as provided in section 815 of the statute. By the act of 1889 (Laws, 1889, p. 142), the circuit judge of each judicial district in the state is authorized, in his sound discretion, to appoint a skilled stenographer as official reporter in his district, whose duty it is, upon the trial of any cause, if requested by either party or ordered by the judge, to take accurate shorthand notes of the oral testimony and other proceedings, which shall be filed in the office of the clerk of the court where the trial is had. If the court, or either party to the suit, or his attorney, requests a transcript of the notes into longhand, it is made the duty of the reporter to cause full and accurate typewritten transcripts thereof to be made, which, when certified to by him as provided in the statute, shall be filed with the clerk of the court where the cause was tried, for the use of the court or the parties, and shall be deemed *prima facie* a correct statement of the testimony and proceedings on the trial. Section 397 of the statute, as amended (Laws, 1893, p. 26), provides that all issues of fact in suits shall be tried by the court, unless the same is referred to a referee pursuant to the provisions of sec-

tion 815, and, if so tried, the evidence shall be presented and reduced to writing, to be either in writing or in stenographic notes, which shall be extended into long-hand, and filed with the clerk of the court in the cause at the request of any of the parties to such suit, or if required by the court, and, where not required to be extended, the notes shall be so filed. Section 815, as amended (Laws, 1893, p. 27), provides that, whenever a suit in equity is at issue upon a question of fact, the court may refer the same to a referee, except as provided in section 397, to take the testimony, and report the same to the court, within such time as may be ordered, and, "when an equity cause has gone to a final decree, the judge of the court rendering the decree shall, within ten days after the entry of the decree, by a proper certificate, identify all the evidence in the cause, whether consisting of the testimony of the witnesses, documentary evidence or exhibits."

The contention for the defendants is that, under these several provisions, before any evidence in an equity case can be considered by the appellate court, it must be identified by the trial judge in the manner provided in section 815, while the plaintiff contends that the latter provision applies only to suits in which the testimony has been taken before a referee, and not to those which have been tried by the court and the testimony taken by the official stenographer. There is undoubtedly some confusion in the statute, and the point is not entirely clear, but we are inclined to concur in the interpretation urged by the plaintiff. A stenographer is an officer of the court, charged with the duty of correctly reporting all the proceedings on the trial, and his certificate is entitled to the same faith and credit as that of any other officer. The transcription of his notes, when certified to by him and filed with the clerk of the court where the cause was

tried, becomes a part of the record and *prima facie* a correct statement of the testimony and proceedings on the trial, and is entitled to faith and credit as such in the appellate court. Nor do we think it makes any difference whether a request for the transcription is made at the time of the trial or afterwards. If no such request is made at that time, the stenographer's notes are required to be filed as a part of the record, and a subsequent transcription thereof, certified to by him, is merely the putting into more intelligible form what is already a part of the record. We are of the opinion, therefore, that the motion to strike the testimony from the files should also be denied.

3. We come, then, to the merits of the case. As already stated, the court below permitted the defendants to offer in evidence, over the plaintiff's objection, oral testimony tending to show that at the time the lease was executed it was understood and agreed between the parties that the first payment should become due and payable thirty days after the defendants began to use water through the entire length of the Sparta canal or ditch, and for that reason the second payment was not due at the time of the commencement of the suit, and therefore defendants were not in default. It is difficult to perceive upon what ground it can be claimed that this testimony is admissible. Clearly, its object and effect was to vary the terms of the written contract between the parties, and no principle of evidence is better settled than that when persons put their contracts in writing, it is, in the absence of fraud, accident or mistake, "conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing." 1 Greenleaf, Ev. (15 ed.) § 275. In *Looney v. Rankin*, 15 Or. 617 (16 Pac. 660), Mr. Justice THAYER, after alluding to the well settled rule that parol

evidence cannot be used for the purpose of contradicting, adding to, subtracting from, or varying the terms of a written contract, or to control its legal operation or effect, proceeds: "Another equally well settled principle, kindred to the one above stated, is that all oral negotiations or stipulations between the parties, preceding or accompanying the execution of a written instrument, are regarded as merged in it. The reason of the rule, as explained by judges and text writers, is 'that the parties, by making a written memorial of their transaction, have implicitly agreed that, in event of any misunderstanding, that writing shall be referred to as the proof of their act and intention; that such application as arose from the paper, by just construction or legal intendment, should be valid and compulsory on them; but that they would not subject themselves to any stipulations beyond their contract, because, if they meant to be bound by any such, they might have added them to their contract, and thus have given them a clearness, a force, and a direction which they would not have by being trusted to the memory of a witness.' And, where a written contract appears on its face to be complete, no addition to, or contradiction of, its legal effect by parol stipulations, preceding or accompanying its execution, can be admitted, any more than its alteration through the same means in any other respect. The law controlling the operation of a written contract becomes a part of it. The rule here referred to, so far as it extends, is inflexible:" 1 Hill's Ann. Laws, § 692; *Stoddard v. Nelson*, 17 Or. 417 (21 Pac. 456); *Portland Nat. Bank v. Scott*, 20 Or. 421 (26 Pac. 276); *Hindman v. Edgar*, 24 Or. 581 (17 Pac. 862); *Abraham v. Oregon & Cal. R. R. Co.* 37 Or. 495 (— L. R. A. —, 12 Am. & Eng. R. R. Cas. [N. S.] 250, 60 Pac. 899). By the terms of the written contract, the first payment was to become due within thirty days

after the defendants "shall commence using the giants or the waters of said canal in placer mining said mining grounds," and the second payment within sixty days thereafter. It is admitted, and the court below found, that the defendants began using the giants and mining on the leased premises with water from the canal on the third day of May; so that, under the plain and unambiguous stipulation of the contract, the first payment became due thirty days, and the second within ninety days, from that date, or about the first of August, and prior to the declared forfeiture and re-entry by the plaintiff and the commencement of this suit.

It is claimed by the defendants, however, that the contract upon this point is ambiguous, and that parol evidence is admissible for the purpose of explaining such ambiguity, and this seems to have been the theory of the trial court. As we read the contract, there is no ambiguity in its language in this regard, but its provisions are clear and distinct. But, if there is any ambiguity, it is patent upon the face of the instrument, and cannot be removed by the application of extrinsic evidence: *Holcomb v. Mooney*, 13 Or. 503 (11 Pac. 274); *Bingham v. Honeyman*, 32 Or. at p. 133 (51 Pac. 735, 52 Pac. 755); 1 Greenleaf, Ev. (15 ed.) § 297, *et seq.* We are of the opinion, therefore, that the court below erred in admitting in evidence the oral testimony concerning the maturity of the payment under the lease, and in finding, as a matter of fact, that defendants were not in default in the payment of rent at the time of the re-entry, or attempted re-entry, by the plaintiff, and that, on the contrary, the second payment was long past due, and on account thereof plaintiff was entitled, under the provisions of the lease, to declare it forfeited, and to repossess herself of the leased premises. This conclusion renders unnecessary the con-

sideration of the other question presented by the plaintiff. The decree of the court below will therefore be reversed, and a decree entered here as prayed for in the complaint.

REVERSED.

Decided 13 August, 1900.

ON MOTION FOR REHEARING.

PER CURIAM. The two questions of fact argued in the petition for rehearing were fully considered by the court before the case was decided. We then concluded that the evidence did not show a subsequent parol modification of the written contract set out in the complaint, nor a subsequent parol waiver of the time stipulated for the \$1,000 payment. A re-examination of the record has confirmed us in this view. The petition for rehearing is therefore denied.

REHEARING DENIED.

Decided 30 July, 1900.

CROSSEN v. OLIVER.

[61 Pac. 885.]

PRIORITY BETWEEN JUDGMENT AND UNRECORDED DEED.*

1. In a contest between rival claimants to land under a judgment and an unrecorded deed, it is not sufficient to instruct the jury that the judgment must have been taken in good faith and without notice or knowledge of such deed to give it precedence, but the manner and kind of notice should have been explained.

ALTERED RETURN ON WRIT AS EVIDENCE—CODE, § 788.

2. The fact that an erasure appears in a sheriff's return on a writ does not render the return inadmissible in evidence, where it is shown that the erasure is in the sheriff's handwriting, and was made before the return was filed: *Nickum v. Gaston*, 23 Or. 322, applied.

JUDGMENT AS EVIDENCE OF DEBT AT THE DATE OF ITS RENDITION.

3. A judgment entered in the usual course of judicial proceedings is conclusive evidence against persons claiming under the debtor that he was justly indebted to plaintiff to the amount of such judgment at the date of its entry, in the absence of fraud and collusion.

* NOTE.—Priority of lien between judgment and unrecorded conveyance: *Vaughn v. Schmalse*, 10 L. R. A. 411; *Blum v. Schwartz*, 16 L. R. A. 668; *Riley v. Martinelli*, 21 L. R. A. pp. 38, 35, 33 Am. St. Rep. 209; *Warnock v. Harlow*, 31 Am. St. Rep. p. 217.

How far a purchaser at an execution or judicial sale is protected as a *bona fide* purchaser: *Riley v. Martinelli*, 21 L. R. A. 33-54, 33 Am. St. Rep. 209; *Shirk v. Thomas*, 16 Am. St. Rep. pp. 387, 388; *Boos v. Morgan*, 30 Am. St. Rep. p. 246.

REPORTER.

37	514
48	391
37	514
48	574

CIRCUMSTANCES EQUIVALENT TO NOTICE*—BONA FIDE PURCHASER.

4. In a contest between opposing claimants under a judgment and an unrecorded deed an instruction that "the notice that will render a party a lienholder in bad faith must be something more than would excite the suspicion of a cautious and wary person. It must be so clear and undoubted, with respect to the existence of a prior right, as to make it fraudulent in him afterwards to take and hold the property,"—is correct, and is supported by *Bowman v. Metzger*, 27 Or. 23, and *Raymond v. Flavel*, 27 Or. 219.

DEED—PRESUMPTION AS TO DATE OF DELIVERY.

5. Where the date of a deed appears in evidence but not the date of its acknowledgment, it will be presumed that it was delivered on the day of its execution.

From Union: ROBERT EAKIN, Judge.

Ejectment by M. S. Crossen against E. W. Oliver. From a judgment in favor of defendant, plaintiff appeals.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. L. A. Esteb*.

For respondent there was a brief over the names of *Thos. H. Crawford* and *Turner Oliver*, with an oral argument by *Mr. Crawford*.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

This is an action by M. S. Crossen against E. W. Oliver to recover the possession of real property. The plaintiff claims under a deed from Mrs. M. M. Caldwell, dated January 25, 1895, and recorded February 27, 1896; and the defendant claims title from the same party by sheriff's

*NOTE.—The subject of Duty regarding knowledge of extraneous circumstances is considered in notes to the following cases: *Lyons v. Leahy* (Or.), 3 Am. St. Rep. 133; *State v. Mason*, 34 Am. St. Rep. at p. 398; *Mercantile Nat. Bank v. Parsons*, 40 Am. St. Rep. p. 305; *Kirsch v. Tozier*, 42 Am. St. Rep. p. 733; *Pleasants v. Blodgett*, 42 Am. St. Rep. p. 627; *Doran v. Dazey*, 57 Am. St. Rep. p. 555; *Batt v. Mallon*, 7 L. R. A. 840.

Unrecorded deeds as constructive notice to subsequent bona fide purchasers. See *Anthony v. Wheeler*, 17 Am. St. Rep. 281; *Pleasants v. Blodgett*, 42 Am. St. Rep. p. 627; *Doran v. Dazey*, 57 Am. St. Rep. p. 555; *Batt v. Mallon*, 7 L. R. A. 840.

Constructive notice from records. See *Kirsch v. Tozier*, 42 Am. St. Rep. p. 733; *Pyles v. Brown*, 69 Am. St. Rep. p. 797.—REPORTER.

sale under an execution issued upon a judgment rendered in favor of Turner Oliver and against Mrs. Caldwell April 2, and docketed April 4, 1895. There were two trials in the court below. At the first the plaintiff had a verdict in accordance with the prayer of his complaint, and at the second the verdict was for the defendant, upon which judgment was rendered dismissing the action, and plaintiff appeals.

1. The first assignment of error is based upon the action of the court in setting aside the first verdict and granting a new trial. The reason assigned by the court for such action is that the jury were imperfectly instructed relative to the sufficiency of the notice or knowledge of Turner Oliver in respect to Crossen's unrecorded deed to render his judgment inferior and subject thereto. The court instructed the jury that a judgment, in order to have precedence over an unrecorded deed, must have been taken in good faith and without notice or knowledge of such deed, but the method or the manner of the notice that would suffice to subordinate the judgment lien was not further or more particularly described or defined. The plaintiff argues that the instruction was favorable, rather than prejudicial, to the defendant, and therefore that he has no cause of complaint. But in this we cannot concur. For aught we know, the jury may have been induced to base a finding of notice upon slight circumstances, remotely disconnected from the subject, and wholly insufficient to warrant it. It is evident from the instructions contained in the record that there was an issue relative to the manner of notice requisite to the subordination of the judgment lien to the unrecorded deed, and the court very properly held that the jury should have been further instructed in the premises.

2. In the course of the second trial the defendant called G. W. Benson, the county clerk, and *ex officio* clerk

of the circuit court, who identified the judgment roll in the case of *Turner Oliver v. M. M. Caldwell*, and the same was introduced in evidence. The witness was then shown the execution under which the land had been sold at sheriff's sale, with the accompanying return, which, on being identified, the defendant attempted to introduce in evidence, whereupon the plaintiff objected because it appeared from the paper that changes had been made in the return which had not been accounted for or explained. It was then shown by the witness that he knew and was familiar with the handwriting of J. F. Phy, the sheriff, and that the return was in his handwriting; that the name "Turner" had been erased, and the initials "E.W." inserted, so as to make it read "E. W. Oliver," instead of "Turner Oliver;" and that the change had been made prior to the filing of the return in his office. The execution and return were thereupon admitted in evidence over objection, and error is assigned. It is the duty of the sheriff to make the return and file it with the clerk, and in this instance it appears that it was so made and filed; that it was in the identical condition, as regards the erasure and change, when filed as when offered in evidence; and that the handwriting in which the change was effected was that of the sheriff who made the return. It is a reasonable presumption, under such conditions, that the change was made by the sheriff when making the return. At any rate, it appears that there has been no erasure or change made therein since it was filed, and hence it was competent as evidence, under Section 788, Hill's Ann. Laws. See *Nickum v. Gaston*, 28 Or. 322 (42 Pac. 130). And a memorandum of sales made by the sheriff, subsequently offered for the purpose of showing that a change had been made in the return, was properly excluded. Such evidence would operate to impeach the return, and it was professedly not offered for that pur-

pose. The return showed upon its face that a change had been made therein, but it was evidently made by the officer whose duty it was to prepare it, and the same was filed and became effective in that form, so that the proffer of the memorandum was irrelevant for the purpose designed.

M. S. Crossen, the plaintiff, took the stand in his own behalf, and testified, among other things, that Mrs. M. M. Caldwell executed a deed to him of the land in question, and that he received the same from her; that the consideration therefor was a year's labor and three cows, for which Mrs. Caldwell was indebted to him; and that she turned the land over to him for such indebtedness. The deed was handed to the witness and identified by him as the one she had executed, whereupon it was offered in evidence. It was regularly and duly executed, dated January 25, 1895, and had indorsed thereon the recorder's certificate, showing that it had been recorded February 27, 1896. The witness further testified that he went into possession of the land in the spring of 1895, and remained in possession until the spring of 1897, when E. W. Oliver entered thereon. There was other evidence offered, with a view of showing that at the time Turner Oliver obtained judgment against Mrs. Caldwell he had either direct notice or had acquired knowledge of such pertinent and relevant facts as made it incumbent upon him to make further inquiry, which, if made, would have led to positive information touching the existence of Crossen's unrecorded deed. In view of the evidence thus adduced, the court gave instructions as follows: "(11) If you find from the evidence in this case that Turner Oliver had a valid and subsisting claim against M. M. Caldwell, and he obtained judgment thereon in good faith, and without notice or knowledge of the existence of this unrecorded deed from her to the plaintiff here, M. S. Crossen, then I instruct

you that entering and docketing this judgment before the recording of this deed would make such judgment a valid lien upon the land, prior in time and right to this unrecorded deed, and you should find for the defendant. (12) I instruct you that this judgment offered in evidence in favor of Turner Oliver is a valid and subsisting judgment as of the date of its entry and docketing, which is the fourth day of April, 1895, and that this judgment became a lien upon the land in question from the said date, prior in time and right to this unrecorded deed from M. M. Caldwell to plaintiff, Crossen, which was recorded February 27, 1896, unless you should further find that Turner Oliver, at or prior to the time he obtained and had docketed this judgment, had notice or knowledge of this unrecorded deed to Crossen. (13) The notice that will render a party a lienholder in bad faith, must be something more than would excite the suspicion of a cautious and wary person. It must be so clear and undoubted with respect to the existence of a prior right as to make it fraudulent in him afterwards to take and hold the property. In this case notice or knowledge that would bind Turner Oliver, and render his judgment subject to the unrecorded deed of Crossen, must be either actual knowledge of the existence of this deed, or actual notice of such facts and circumstances as would have enabled him, by following up such information, to have ascertained that Crossen held this deed and claimed this land. (14) I instruct you, gentlemen of the jury, that unless you find from the testimony that Turner Oliver had information that M. S. Crossen was the owner of the land in question at the time he took judgment against M. M. Caldwell, or at the time had information that put him on his inquiry, and that such inquiry, if pursued, would have developed the fact that Crossen was the owner, or claimed to be the owner, of the lands in question, you should find for the

defendant. (15) The deed only takes effect as a conveyance of the land from the date that it was delivered to Crossen by Mrs. Caldwell. There is no presumption that a deed is delivered on the date of its execution. If it is not shown to have been actually delivered before the recording of it, it will be presumed to have been delivered at the time of the date of the recording. (16) If it is not shown by the proof to have been delivered prior to April 4, 1895, then there is no question of notice to Oliver to be considered by you."

3. A criticism is made that instructions 11 and 12 are conflicting, in that by the former the jury were told that Oliver had a valid and subsisting judgment lien, superior to Crossen's unrecorded deed, provided it was founded upon a valid and subsisting claim, and was obtained in good faith without notice of such deed, while by the latter they were instructed that Oliver's judgment was valid as of its purported date, which is prior in time and right to Crossen's deed, unless prior thereto Oliver had notice or knowledge thereof, thereby eliminating the condition that the judgment must have been based upon a valid demand and obtained in good faith. What is contained in the latter instruction touching the prior notice or knowledge of the unrecorded deed sufficiently covers the question of good faith, when the instructions are construed in *pari materia*, as they ought to be. A judgment, when rendered in the regular course of judicial proceedings by a court of competent jurisdiction, is, in the absence of fraud or collusion, conclusive evidence against grantees claiming under the judgment debtor that the relation of debtor and creditor existed between the parties to the record, and of the amount of the indebtedness: *Pickett v. Pipkin*, 64 Ala. 520; *Swihart v. Shaum*, 24 Ohio St. 432; 12 Am. & Eng. Enc. Law (1 ed.), 86, 149d. The judgment not having been attacked for fraud or collusion, its validity was

not in controversy. The latter instruction was therefore unobjectionable. The former went further than was necessary, but not to the injury of the plaintiff.

4. It is more seriously urged, however, that it was error for the court to inform the jury that "the notice that will render a party a lienholder in bad faith must be something more than would excite the suspicion of a cautious and wary person. It must be so clear and undoubted with respect to the existence of a prior right as to make it fraudulent in him afterwards to take and hold the property." This language was approved in *Raymond v. Flavel*, 27 Or. 219, 246 (40 Pac. 158), and supported by *Bowman v. Metzger*, 27 Or. 23 (39 Pac. 3, 44 Pac. 1090). The doctrine, as it respects a purchaser in good faith, is fully discussed in these cases, and the proper rule in the premises ascertained and determined. It will be found from an examination thereof that the plaintiff had quite as favorable instructions upon the subject as he could reasonably ask, and he cannot, therefore, be heard to complain.

5. The next and last complaint is of the court's instruction touching the presumption that obtains where a deed is shown to have been delivered, and there is no evidence touching the date or time of its delivery, except what appears by the deed itself. The bill of exceptions does not show that there was any testimony introduced fixing the actual date upon which Caldwell delivered the deed to Crossen, and the matter was apparently left for ascertainment through the legal presumption that would follow when it is shown, without more, that the deed had been actually delivered. Where the deed and its acknowledgment bear the same date, the authorities are in perfect accord to the effect that where the deed is found in the possession of the grantee, or a delivery is shown, without fixing the date at which it is made, the

presumption is that it was delivered at the time it bears date. There is a disagreement among the authorities whether the date of the deed or of the acknowledgment should prevail, where they are not in accord. The presumption is disputable, however, and the date of its actual delivery may be proven *aliunde*: 9 Am. & Eng. Enc. Law (2 ed.), 152, 153; *Kendrick v. Dellinger*, 117 N. C. 491 (23 S. E. 438); *Ten Eyck v. Whitbeck*, 35 N. Y. Supp. 1013; *McGee v. Allison*, 94 Iowa, 527 (63 N. W. 322); *Nichols v. Sadler*, 99 Iowa, 429 (68 N. W. 709); *Geiss v. Odenheimer*, 4 Yates, 278 (2 Am. Dec. 407); *Breckenridge v. Todd*, 3 T. B. Mon. 52 (16 Am. Dec. 83); *Hall v. Benner*, 1 P. & W. 402 (21 Am. Dec. 394). The date of acknowledgment of the deed in question is not shown, as we have not the instrument before us, but the date of the deed appears in the record; and, under this condition, the presumption ought to prevail that it was delivered at the date which it bears of its execution. The instruction touching the presumption that should obtain under the condition stated was therefore erroneous.* The sixteenth instruction is a logical sequence from the one under discussion, but it is not sound, in view of the rule as we have ascertained it to be touching the presumption that should apply as to the time of delivery. The true rule does not put the question of notice out of the case, as did the one adopted by the court below. These considerations reverse the judgment below, and it is so ordered.

REVERSED.

*The instructions were as follows: (15) "The deed only takes effect as a conveyance of the land from the date that it was delivered to Crossen by Mrs. Caldwell. There is no presumption that a deed is delivered on the date of its execution. If it is not shown to have been actually delivered before the recording of it, it will be presumed to have been delivered at the time of the date of the recording. (16) If it is not shown by the proof to have been delivered prior to April 4, 1895, then there is no question of notice to Oliver to be considered by you."—REPORTER.

Argued 24 July; decided 13 August; rehearing denied 12 November, 1900.

MATTIS v. HOSMER.

[62 Pac. 17, 682.]

COMPETENCY OF STATEMENTS BY ALLEGED AGENT.

1. In a suit to enjoin the appropriation of water from a creek, testimony that a third party, who lived with plaintiff, made statements recognizing defendant's right to exclusive use of the water, and that at his request defendant permitted plaintiff to use the water for purposes of irrigation, was not admissible as against plaintiff, there being no proof of a general agency.

INCOMPATIBLE USES OF WATER.

2. One party's right to use water for irrigation purposes is not necessarily incompatible with another's right to use the same water in operating a mine, since the diverse uses are generally made at different seasons of the year.

ESTOPPEL BY SILENCE.

3. To make a silent acquiescence operate as an estoppel it must appear that the person against whom the claim is made had some interest to be affected.

METHOD OF TRANSFERRING MINING DITCH.

4. Under Hill's Ann. Laws, § 8833,* declaring that ditches used for mining purposes shall be regarded as real estate during such use, and section 8834,* providing that they shall be governed in their sale and transfer by the law applicable to such property, an interest in a ditch used for mining purposes cannot be transferred except by deed.

WATER RIGHT AS AN APPURTENANCE.

5. The use of water from a stream for a beneficial use in connection with a tract of land makes the right appurtenant to such land, and it passes under a deed thereto.

OUSTER AGAINST COTENANT.

6. In the absence of knowledge by a tenant in common that a cotenant claims the property adversely to him, there is not an adverse possession without an actual ouster or some equivalent act showing an intent to exclude.

DEFECT CURED BY DECREE—ESTOPPEL ON CHANGING CLAIM.

7. Where both parties to a suit involving the right to a ditch based their claims on adverse rights, and neither alleged an appropriation of the water as the foundation of his claim, but the trial was had on the theory that defendant's grantor had appropriated the water and conveyed it as appurtenant to the land, and on appeal a decision was made, based on the theory of an appropriation of the water by plaintiff's grantor, it was too late for defendant to urge, on petition for rehearing, that the complaint did not allege any such appropriation by plaintiff's grantor; the case having been tried through by both sides on the theory of an appropriation, neither party will now be heard to claim otherwise.

SUFFICIENCY OF EVIDENCE—PUBLIC LANDS.

8. Where, in an action to enjoin interference with plaintiff's water right there was uncontradicted evidence that plaintiff's grantor was operating a placer

* NOTE.—These sections were repealed in 1898 and re-enacted in a modified form. See Laws, 1898, pp. 16, 18, § 9.—REPORTER.

mine on public land in 1868, at the head of the ditch in question, and was using the water therefrom, and in 1878 made a homestead entry on such land, and in 1878 made final proof of settlement and cultivation, it was sufficient to justify a finding that the land was government land at the time of the appropriation of water by plaintiff's grantor.

TRANSFER OF IRRIGATING AND MINING DITCHES.

9. A ditch used for irrigating purposes is an appurtenance to the land which it waters, but while Sections 3833 and 3834,* Hill's Ann. Laws, were in force a mining ditch could not be transferred except by the formalities required in conveying real property: *Nevada Ditch Co. v. Bennett*, 80 Or. 59, and *Turner v. Cole*, 31 Or. 154, distinguished.

From Jackson: HIERO K. HANNA, Judge.

This is a suit by John Mattis against Nelson Hosmer and others to enjoin the appropriation of water diverted from a nonnavigable stream, and to recover damages for an alleged trespass. It is stated in the complaint that plaintiff is the owner of one hundred and twenty acres of land in Jackson County, Oregon, through which the west fork of Foot's Creek flows in a northerly direction; that for more than twenty-two years he and his grantors have owned and been in the possession of a ditch that diverts water from said creek, which is used to irrigate his land, and to operate during the rainy season a placer mine thereon; and that the defendant Nelson Hosmer on December 16, 1896, posted a notice on said land to the effect that he claimed said ditch and the use of the water flowing therein, and on January 24, 1897, he and

* NOTE.—Sections 3833 and 3834, Hill's Ann. Laws, were enacted 29 October, 1870, and repealed 14 October, 1898, by an act which repealed several sections relating to mines and substituted other provisions therefor: Laws, 1898, pp. 16, 18. Section 9 of the new act covers the subject of ditches. The old sections, so far as involved in this case, are here reprinted for convenience of reference, together with section 9 of the new act. Section 3833. "Ditches used for mining purposes and mining flumes, permanently affixed to the soil, be and the same hereby are declared real estate during the time the same shall be used for that purpose," etc. Section 3834. "The laws relative to the sale and transfer of real estate, and the application of the liens of mechanics and laborers therein, be and they hereby are made applicable to said ditches and flumes," etc. Laws, 1898, p. 16, section 9. "Ditches and mining flumes, permanently affixed to the soil, are hereby declared to be real estate," etc.—REPORTER.

his codefendants unlawfully destroyed plaintiff's flumes, to his damage in the sum of \$100. The defendants deny the material allegations of the complaint, and aver that Hosmer was the owner of certain lands joining plaintiff's on the north, and that for more than fifteen years he and his predecessors have owned and been in the adverse possession of said ditch, and have appropriated all the water flowing therein, and also from certain gulches, to the irrigation of his land and to the operation of placer mines. The reply having put in issue the allegations of new matter in the answer, a trial was had, resulting in a decree that Hosmer was the owner of said ditch, and entitled to the use during the irrigating season of one-half the water flowing in the creek at the head of the ditch, and during the mining season to the whole thereof, and also to all the water flowing in said gulches, and plaintiff appeals.

MODIFIED.

For appellant there was a brief and an oral argument by *Mr. Davis Brower*.

For respondents there was a brief and an oral argument by *Mr. James R. Neil*.

MR. JUSTICE MOORE, after stating the facts, delivered the opinion of the court.

The testimony shows that in 1867 John Dick, James Hand, M. Winegardner, and John Pearson constructed the ditch in question from a point on the west fork of Foot's Creek to its confluence with Salt Creek, a distance of about three miles, and diverted water from the former stream, which they used about two months to operate a placer mine, each owning an equal interest in the ditch and water right. This mine having proved unremunerative, Winegardner sold his interest in the ditch and water

right to Pearson, who in 1868 transferred his interest therein to one Orin Weare, who, with Hand, was then engaged in working a placer mine on public land at the head of the ditch, using water therefrom for that purpose. Hand, after working in the mine on Foot's Creek about three years, sold his interest in the ditch and water right to one Silas Draper, who operated the mine with Weare until about 1873, when the latter, concluding that the land was not valuable for its minerals, made a homestead entry thereon, but did not irrigate it thereafter; for, having taken charge of a band of sheep at Evans Creek, he returned to his claim in the irrigating season about every six months, where he remained only a day or two at a time, so as to avoid an abandonment thereof (Rev. St. U. S. § 2297); and, having made final proof of his settlement and cultivation, he, on April 22, 1879, conveyed the premises, with the appurtenances, to the plaintiff, who has ever since used a part of the water from said ditch to irrigate his crops, and for four years immediately preceding the commencement of this suit used the water therefrom to operate a placer mine on his land. The defendant Nelson Hosmer on September 18, 1879, secured from George W. Lance a deed conveying certain land, a ditch constructed thereto from the west fork of Foot's Creek across the north boundary of plaintiff's land, and the right to use for the purpose of irrigation one-half of the water flowing in the creek at the head of said ditch. In 1868 Dick sold his interest in the ditch, which he helped to construct, to one Alexander Orme, who, in 1877, having secured whatever interest Draper had therein, made a homestead entry on one hundred and sixty acres of land, across which the ditch was dug; and in 1879, claiming to be the sole owner of the ditch and water right, he sold the same and relinquished his homestead to one Charles T. Anderson, who,

on April 12, 1881, transferred the same by bill of sale to Hosmer, who thereupon filed upon the land so relinquished, changed his point of diversion from the Lance ditch to the old ditch near the south boundary of plaintiff's land, to enable him to conduct the water to a greater elevation, and for more than fifteen years he has constantly used the water flowing in the ditch to irrigate his crops.

1. It is contended by plaintiff's counsel that the testimony shows that his client was in the exclusive possession of the old ditch, and used the water flowing therein to irrigate his crops, from the time he secured Weare's deed until the point of diversion was so changed, after which Hosmer used the water by his permission, and never made any claim thereto until December 16, 1896, when he posted a notice to that effect; and hence the court erred in finding, in effect, that since Hosmer took possession of the ditch he had expressly permitted the plaintiff, at his request, to use the water to irrigate his garden and growing crops. George W. Lance, as defendants' witness, testifies that prior to executing the deed to Hosmer he owned the first right to the use of the water in the west fork of Foot's Creek, and that in 1879, the water therein becoming low, he discovered that plaintiff was diverting it, which he forbade, and took out the box used therefor. This testimony is not contradicted in any manner, and hence we conclude that Hosmer secured by Lance's deed the right to use one-half of the water flowing in the creek, for irrigation. This deduction is strengthened by the circumstance that Weare never used any water to irrigate the crops on his homestead after filing thereon, from which it may be reasonably inferred that he knew that Lance's predecessor enjoyed the superior right to the use of the water for irrigation, and that plaintiff took by his deed no greater interest in the premises than his grantor pos-

sessed. Hosmer, having the superior right to the use of the water, is entitled thereto, unless deprived thereof by plaintiff's adverse use. Some of the testimony upon which the finding complained of is predicated was admitted over objection, and is wholly incompetent. Thus, without proving any general agency, several witnesses were permitted to testify that one Lewis Silbereisen, who lived with the plaintiff, made statements which would seem to recognize Hosmer's right to the exclusive use of the water in the old ditch, and that at Silbereisen's request Hosmer permitted the plaintiff to use the water to irrigate his crops whenever it could be spared by him for that purpose. This testimony, with that of other witnesses whose authority to speak for the plaintiff upon this subject was not established, we are compelled to disregard.

Considering the admissible testimony on this branch of the case, Mrs. Hosmer, as a witness for defendants, testifies that on a certain Sunday, about nine years prior to the trial, the plaintiff, at their house, requested her husband to let him have the use of the water to irrigate his garden. Hosmer, as a witness in his own behalf, corroborates his wife's testimony in this respect, and also testifies that on another occasion, as he was going to the head of the ditch, the plaintiff asked him for the use of the water to irrigate his crops. The plaintiff denies the requests so imputed to him, and testifies that he permitted Hosmer to use the water from the ditch to irrigate his crops. It will thus be seen that the testimony from which the finding adverted to was made is conflicting and irreconcilable; but the court below had the advantage of seeing the witnesses and of hearing them testify, thereby being enabled to observe their manner and bearing while under examination, and hence is better able to reach a correct conclusion respecting a disputed question of fact

than this court can possibly be from an inspection of the transcript. To have reached a different conclusion would, in our judgment, have been against the weight of evidence; for six uncontradicted witnesses testify that they are acquainted with the plaintiff's general reputation for truth and veracity in the vicinity in which he lives, and that such reputation is bad. From a careful examination of the testimony, we are satisfied that, Lance having conveyed to Hosmer the use of one-half of the water in the creek, each is entitled to the use of a moiety thereof, to irrigate his cultivated lands, and that plaintiff is not entitled to the use of any water therefrom until the needs of the prior appropriators are fully supplied; and hence that part of the decree which gives Hosmer one-half of the water flowing in the creek at the head of the ditch during the irrigating season must be affirmed.

2. Another question to be considered is the relative rights of the parties to the use of the water flowing in the creek during the winter or mining season. The use of water for irrigation is not necessarily incompatible with the use thereof for mining, for the growth of plants in the arid region is stimulated by the application of water in the spring and summer to the soil which produces them, while the separation of gold from the baser material in which it is imbedded, by means of water secured from small streams, is usually accomplished with better results when prosecuted in the rainy or winter season; and, this being so, the agriculturist and the miner might own and enjoy separate uses of water from the same stream without interfering with each other's rights. The appropriation of water to a beneficial use is founded upon the rule of necessity, which, when satisfied, becomes the measure of the right, whereupon subsequent appropriators may use the surplus of that to which the

prior appropriator is entitled, when not necessary to his use: *Ortman v. Dixon*, 13 Cal. 34; *McKinney v. Smith*, 21 Cal. 374; *Smith v. O'Hara*, 43 Cal. 371; *Edgar v. Stevenson*, 70 Cal. 286 (11 Pac. 704); *Barnes v. Sabron*, 10 Nev. 217.

3. Hosmer's right to the exclusive use of the water for mining purposes is based upon the assumption that Weare transferred his interest in the ditch and water right to Draper, the only evidence of which is the testimony of Alexander Orme to that effect. This witness, on cross-examination, in answer to the question, "How do you know that Draper got Weare's interest?" said: "Draper told me so. He explained it to me. Q. Is that the only way you know whether Draper owned any of that ditch,—simply what he told you? A. That is all; yes." It will be remembered that Weare secured from Pearson the right to use during the mining season an undivided one-half of the water in the old ditch, and having enjoyed that right about five years, in operating a placer mine upon the land to which he thereafter secured a title, the water was thus appropriated to a beneficial use; and hence the turning point, so far as it relates to the use of the water for mining purposes, is whether such right was conveyed to plaintiff as an appurtenant to the land, or was transferred to Draper, from whom it passed by *mesne* transfers to Hosmer. The plaintiff, as a witness in his own behalf, testifies that when he made a bargain to purchase his land Weare told him that the ditch belonged to the premises and was his property, and that Draper stood by and said nothing. Alexander Orme testifies that he purchased Draper's interest in the ditch and water right in 1877, and, as such purchase was made before plaintiff secured his deed, Draper had no interest in the property, and his

silence cannot be construed as an estoppel against Hosmer, who succeeded to whatever interest he had therein : 2 Herman, Estop. § 939.

4. At the time it is claimed that Weare transferred his interest to Draper, the statute then in force provided that ditches, during the times they were used for mining purposes, were to be regarded as real estate, and, in their sale and transfer, governed by the law applicable to that class of property : Hill's Ann. Laws, §§ 3833, 3834.

5. It does not appear that Weare ever received any deed to an undivided one-half or other interest in the ditch and water right from Pearson, but as Mattis and Hosmer both assert title thereto from Weare, as a common source, they are estopped from denying his title : Herman, Estop. § 593. Notwithstanding mineral lands are not subject to entry and settlement under the provisions of the homestead law of the United States (Rev. St. U. S. § 2302), George W. Bailey, plaintiff's witness, who lived on the west fork of Foot's Creek, from 1866 to 1880, testifies that from 1868, for about ten years, Weare, having cleaned out the old ditch at its upper end, used water therefrom to operate his mine, and that he continued to use the water for mining purposes more or less every year while the land remained in his possession. This shows that Weare applied the water to the land during the mining seasons, thereby making it appurtenant to the premises. No evidence was offered tending to show that Draper secured a deed from Weare, and as he could not be deprived of his interest in the ditch during the time it was used for mining purposes, except by his deed, his title thereto was not transferred to Draper, but passed, as an appurtenant to the land, by his deed to the plaintiff.

6. Alexander Orme supposed, from John Dick's repre-

sentation and sale, that he secured an undivided one-half interest in the ditch and water right; but, Draper having purchased from James Hand an undivided one-fourth interest therein, Orme undoubtedly secured no greater interest by Dick's sale. But having purchased Draper's interest, of which he took possession, and thereafter made a settlement and entry upon one hundred and sixty acres of land as a homestead, across which the ditch was constructed, he had the right to apply the water thereto; and when he surrendered his interest to Anderson, who transferred the same to Hosmer, the latter took an undivided one-half interest in the ditch, as a tenant in common with the plaintiff in the use of the water for mining purposes; and, no evidence having been introduced that plaintiff had knowledge of any adverse claim on the part of Hosmer, his possession cannot be considered adverse, unless there was an actual ouster, or some equivalent act showing an intent to exclude the cotenant: *Freeman*, Co-Ten. § 221; *Colman v. Clements*, 23 Cal. 245; *Unger v. Mooney*, 63 Cal. 586 (49 Am. Rep. 100); *Thomas v. Glendinning*, 13 Utah, 47 (44 Pac. 652); *Smith v. North Canyon Water Co.* 16 Utah 194 (52 Pac. 283). The court having erred in decreeing that Hosmer was entitled to use for mining purposes all the water flowing in the ditch and in the said gulches, the decree will be modified, and one entered here giving plaintiff an undivided one-half of the water therefrom during each mining season.

MODIFIED.

Decided 12 November, 1900.

ON MOTION FOR REHEARING.

MR. JUSTICE MOORE delivered the opinion of the court.

7. A petition for a rehearing of this cause having been filed, it is insisted that inasmuch as the complaint does not allege that Mattis claimed any right to the use of the water of Foot's Creek by appropriation, either by himself or those with whom he was in privity, an error was committed in awarding him, for mining purposes, an undivided one-half of the water diverted from that stream, or flowing from any source into the ditch in question. The plaintiff and the defendant predicate their respective claims to the use of the water upon an adverse right, and neither alleges an appropriation as the foundation of his claim, notwithstanding which the cause was tried upon the theory that Lance appropriated the water of the stream to the irrigation of the land conveyed by him to Hosmer, who took the use of the water as an appurtenant thereto, so that if it had been necessary to allege in the complaint that plaintiff's predecessor appropriated the water to the beneficial use to which it was applied, and to state the quantity of water thus used, it is now too late to question its sufficiency on that ground.

8. It is claimed that the appropriation of water can be made for use upon public land only; that the transcript contains no evidence tending to show that Weare, plaintiff's predecessor, ever appropriated the water from Foot's Creek to any use upon government land, and, this being so, no presumption should be indulged to that effect. We think the testimony fairly shows that Weare and Hand, in 1868, were engaged in operating a placer mine on public land at the head of the ditch in question, using water therefrom to extract the gold; that about 1873 Weare made a homestead entry on the land upon

which he had thus been mining; and that from 1868 to 1878, when he made final proof of his settlement upon and cultivation of this land, he used the water, as testified to by George W. Bailey, more or less every year for mining purposes. And, these facts having been established by uncontradicted testimony, no necessity exists for indulging in a presumption that the land upon which Weare mined and thereafter entered under the homestead laws of the United States, whereby he secured a title from the government, was, at the time he appropriated the water thereon, public.

9. The defendant's counsel, invoking the rule announced in the case of *Hindman v. Rizor*, 21 Or. 112 (27 Pac. 13), contend that an error was committed in concluding that the transfer from Weare to Draper of his interest in the ditch and water right was void because it was not evidenced by any writing. The statute in force at the time it is claimed such transfer was made presented the anomalous condition of treating a placer claim as personal property, and providing that it might be granted, sold, and conveyed by bill of sale and delivery of possession, but declaring that ditches used for mining purposes were to be regarded as real estate during the time they were used for that purpose, and in their sale and transfer governed by the law applicable to that class of property: Hill's Ann. Laws, §§ 3833, 3834. The ditch in controversy in the case referred to was used for conducting water from Alder Creek to be used in irrigating government land, and not for mining purposes, and hence the rule announced in that case, and followed in *Low v. Schaffer*, 24 Or. 239 (33 Pac. 678), *Nevada Ditch Co. v. Bennett*, 30 Or. 59 (60 Am. St. Rep. 777, 45 Pac. 472), and *Turner v. Cole*, 31 Or. 154 (49 Pac 971), has no application whatever to the case at bar, in which the evidence conclusively shows that the ditch was constructed, and at

the time of the alleged transfer was being used, for mining purposes. In the enactment of such statute it was probably assumed that the transfer of a ditch used for mining purposes implied a change in its location, or the appropriation of the water to other premises or to different uses, thereby necessitating a severance of the easement from the servient estate, to accomplish which it was provided that the evidence of such conveyance should be more formal than in cases of the transfer of placer mines, which was effected by a bill of sale or a delivery of the possession, thereby carrying the ditch used in operating the mine as an appurtenant thereto. By giving to the statute such construction, we reached the conclusion that Orme secured an undivided one-half interest in the ditch and water right from John Dick and Silas Draper, and that Hosmer succeeded to Orme's interest therein by securing his possessory right to a tract of public land across which the ditch had been constructed, and to which it was appurtenant. When Orme took possession of the ditch and used the water, he supposed he had secured the entire interest therein; but as he took under Dick and Draper, who, the evidence shows, each had an undivided one-fourth interest therein, he secured no greater interest than they possessed. If it had appeared that Weare had abandoned the ditch, and for a year thereafter failed to exercise ownership over the same, or had removed from the state with intent to change his residence, and remained absent one year, without having exercised any ownership over the ditch or water right, his right thereto would have been deemed lost: Hill's Ann. Laws, § 3833. The evidence shows, however, that he used the water for mining purposes more or less every year until he conveyed the premises to Mattis, who testifies that Weare informed him that he was the sole owner of the ditch and water right, which passed to him by the deed, as an ap-

purtenant to the land. There is nothing but hearsay evidence to show that Draper ever owned more than an undivided one-fourth interest in the ditch, and it has not been established that he transferred a greater interest to Orme. These considerations compel us to deny the petition.

REHEARING DENIED.

Argued 25 July; decided 15 August, 1900.

STATE EX REL. v. MOORE.

[62 Pac. 28.]

DISTRICT ATTORNEY'S FEES IN DIVORCE CASES—REPEAL BY IMPLICATION.

1. The requirement of Section 1074, Hill's Ann. Laws, that the plaintiff in every divorce suit shall pay a stated fee to the district attorney, is not affected by the acts of 1896 or 1899 relating to the fees of certain named officers, for neither the district attorney, his fees nor his duties are referred to therein.

DISTRICT ATTORNEY'S FEES—IMPLIED REPEAL.

2. The act of 1898 placing district attorneys on a salary, and providing that the fees, percentages, commissions, and charges then established by law, or in any manner allowed for the performance of any act or duty required of the attorney, except services rendered for or on behalf of the state, or for or on behalf of Multnomah County, for which no charge shall be made, should continue and remain established fees; and that the officers should collect from the person or party for whom services should be rendered, or who might be charged with the payment thereof, did not repeal by implication Section 1074, Hill's Ann. Laws, as the exception in the act of 1898 as to services on behalf of the state was intended to apply to instances in which the district attorney had theretofore been authorized to charge and collect from the state, and not to cases where his fees were to be collected from private parties for whom the services are rendered, or who might have been charged with the payment thereof.

From Multnomah: ARTHUR L. FRAZIER, Judge.

Mandamus by the State of Oregon, on the relation of Effie Fitzgerald, to compel Dan J. Moore, as Clerk of the Circuit Court for the County of Multnomah, to file a complaint in a divorce case without prepayment of the district attorney's fees provided by Section 1073 of Hill's Ann. Laws. A demurrer to the writ was sustained, and the proceeding dismissed, whereupon relator appealed.

AFFIRMED.

87	536
441	180
441	151

For appellant there was a brief and an oral argument by *Mr. Ulysses Simpson Grant Marquam*.

For respondent there was a brief over the name of *Bernstein & Cohen*, with an oral argument by *Mr. Alex. Bernstein*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

1. The statute provides that the state shall be deemed a party defendant in any suit for the dissolution of the marriage contract, or to have the same declared void (Hill's Ann. Laws, § 977); that the district attorney shall be allowed a fee of \$10 for actually defending the same on behalf of the state (section 1073). And the plaintiff is required by the act of 1878 to deposit such fee with the clerk of the court before the complaint is filed (section 1074). The petitioner claims, however, that the provision of the statute requiring the plaintiff to make such deposit has been repealed by subsequent legislation. In 1895 the legislature passed an act amendatory of an act "to change in part the compensation and mode of payment thereof to the county clerks, recorders of conveyances, clerks of the circuit courts and county courts in the state, and of the sheriffs of the several counties; to repeal certain provisions of the statute providing for the payment of certain fees to said officers, and of trial fees in certain cases; to provide for the payment by parties to appeals, actions, suits and proceedings of certain sums to assist the state and several counties in defraying expenses consequent upon the administration of justice; to provide for the appointment of deputies for the various officers above enumerated in certain cases, and for their compensation, and for the payment to the state and several counties of sums of money and fees paid to said officers by said parties litigant, filed in the

office of the Secretary of State February 22, 1893 :'' Sess. Laws, 1895, p. 77. The first seven sections relate to the salaries of the county clerks, clerks of the circuit and county courts, recorders of conveyances, and sheriffs of the several counties of the state, and the manner of their payment. By section 8 it is made the duty of the clerks of the circuit and county courts to exact in advance from parties litigant in any suit, action or proceeding for the enforcement of private rights, certain fees, and at the time such suit, action or proceeding comes on for final trial or hearing, a certain sum as a trial fee ; and section 9 provides that such sums "are to be in lieu of all the fees such parties have heretofore been required to pay to clerks, sheriffs and all other officials in such matters, and the trial fee provided for in the preceding section of this act shall be in lieu of the trial fee such parties were, prior to the adoption of this act, required by law to pay, and no such fees or trial fee last referred to, or any other fee, shall hereafter be exacted from the parties to any suit, action or proceeding." In 1899 the legislature passed another act (Sess. Laws, 1899, p. 140), "providing for the payment of certain fees to the recorders of conveyances, clerks of the circuit courts and county courts in the state, and to sheriffs in certain counties, and for the payment of trial fees, and providing for the payment to the state and several counties of sums of money and fees paid to said officers by parties litigant and others ; and providing for the manner of payment of salary of county officers." Sections 1, 2 and 3 of this act provide for certain fees to be paid by parties litigant to the sheriff and clerks of the circuit and county courts in certain counties, including Multnomah ; and section 4 provides that the several sums required to be paid by such act "are to be in lieu of all the fees such parties have heretofore been required to pay to clerks, sheriffs and all other officials

in such matters ; * * * and no other fees than those hereinbefore recited shall hereafter be exacted from the parties to any suit, action or proceeding."

The contention of the petitioner is that under section 9 of the act of 1895, and section 4 of the act of 1899, no fees can be required or exacted of parties litigant, except such as may be provided for therein. This argument is based upon the provision that the several sums required to be paid shall be in lieu of all the fees the parties have heretofore been required to pay sheriffs, clerks, etc., "and all other officials in such matters," and "no other fees than those hereinbefore recited shall hereafter be exacted," and the court is asked to construe this language to mean and include the district attorney and his fees. It will be observed that such officer is not mentioned in the title or the body of either of the acts in question. The compensation or fees of district attorneys was not the matter under consideration by the legislature at the time of their passage. This is apparent from their titles, which render very important aid in their construction: *State v. Robinson*, 32 Or. 43 (48 Pac. 357). At the time of the passage of the act of 1895 the district attorney was paid chiefly by fees, and to deprive him of his emoluments without mentioning his office, either in the title or body of the act, would not only probably be unconstitutional, under Section 20, Art. IV, of the Constitution, which provides that every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title (*Singer Mfg. Co. v. Graham*, 8 Or. 17, 34 Am. Rep. 572; *Oregon & Wash. Invest. Co. v. Rathbun*, 5 Sawy. 32, Fed. Cas. No. 10,555; *Northern Pac. Exp. Co. v. Metschan*, 32 C. C. A. 530, 90 Fed. 80), but would be against the generally accepted canons of construction. The natural and reasonable construction to apply to the language used, when taken in connection with the title

and subject-matter, is that the clauses relied upon by the plaintiff were intended to and do apply to the officials named in the title, or others similarly affected and performing a like duty. The evident purpose of the legislature in the passage of the acts of 1895 and 1899 was to deal with the officers named therein, and to provide for the payment by litigants of certain sums, which were to go into the county treasury in lieu of the fees theretofore paid to such officers. The fee required by section 1074 to be paid to the clerk by the plaintiff in a divorce suit is a mere deposit for the district attorney, and not for his own use or that of the county. Under the law as it stood prior to the act of 1898, placing the district attorney upon a salary, he was entitled to such fee as compensation for his services. Since that act the fee still remains, and the district attorney is required to collect it as before, but he must pay it over to the county treasurer for the use and benefit of the county. So we conclude that neither the act of 1895 nor that of 1899 operated to repeal the provisions of section 1074 of the statute, requiring the plaintiff in a divorce proceeding to deposit with the county clerk \$10 as a district attorney fee.

2. Again, it is contended that the act of 1898 (Sess. Laws, 1898, p. 7) "to regulate and fix the compensation of the district attorney of the Fourth Judicial District of the State of Oregon, * * * and to require the payment into the county treasury of all fees, percentages, commissions, and charges collected by" him, operated as a repeal of the provision requiring such deposit. This contention is based particularly upon section 8, which reads: "The fees, percentages, commissions, and charges now established by law, or in any manner allowed, for the performance of any act or duty by or required of the district attorney, * * * (except services rendered for or on behalf of the state, or for or on behalf of Mult-

nomah County, for which no charge shall be made), shall continue and remain the established fees, percentages, commissions, and charges for such act or duty, and the respective officers herein named are hereby required to collect from the person or party for whom service may be rendered, or who may be charged with the payment thereof, said fees, percentages, commissions, and charges for such duty performed, or to be performed, as provided by law for the use and benefit of Multnomah County, and said officers shall pay over the same to the county treasurer of Multnomah County on or before the first Monday of each and every month." The position of the petitioner is that under this act the district attorney fee in divorce cases is not allowed, for two reasons: First, under the act of 1895, in force at the time of its passage, it was not "established by law"; and, second, the service performed by the district attorney in such cases is rendered for and on behalf of the state, for which no charge can be made under the act of 1898. The first contention is answered, as already suggested, by the fact that neither the title nor the body of the act of 1895 mentions the office of district attorney, nor was the legislation an attempt to regulate the fees of that office. And the second is, in our opinion, without merit. The act of 1898 expressly provides that the fees then established by law for the performance of any duty by the district attorney shall continue and remain the established fees, and shall be collected by that officer from the person or party for whom the service may be rendered "or who may be charged with the payment thereof," for the use and benefit of Multnomah County, and by him paid over to the treasurer thereof. It is true, the act provides that no charge shall be made for services rendered by the district attorney for or on behalf of the state or of the county. But this provision was intended to apply to instances in

which the district attorney had theretofore been authorized to charge and collect from the state or county, and not to cases where his fees are to be collected from private parties for whom the services are rendered, or "who may be charged with the payment thereof." We are of the opinion, therefore, that the judgment of the court below should be affirmed, and it is so ordered. **AFFIRMED.**

Decided 17 September, 1900.

STATE EX REL. v. GRAND JURY.

[62 Pac. 208.]

DISMISSING APPEAL—TERMINATION OF CONTROVERSY.

Where conditions have so changed that a decision of the court could not be made effective, an appeal will be dismissed; thus, where a writ of mandamus to compel a grand jury to inquire into a criminal charge is refused, and afterward the grand jury is discharged, so that it becomes impossible to enforce a judgment against it, if one should be rendered by the appellate court, the appeal will be dismissed: *Moores v. Moores*, 38 Or. 281, applied.

From Multnomah: **ALFRED F. SEARS, JR., Judge.**

Application by the State of Oregon, on relation of Charles F. Lord, District Attorney for the Fourth Judicial District, for writ of mandamus to compel the grand jury of Multnomah County to inquire into a certain criminal charge. From a judgment dismissing the writ, plaintiff appeals. **DISMISSED.**

For appellant there was a brief by *Mr. D. R. N. Blackburn*, Attorney-General.

No brief for respondents.

MR. CHIEF JUSTICE BEAN delivered the opinion.

This is a mandamus proceeding, commenced in April, 1897, to compel the then grand jury of Multnomah County to inquire into a criminal charge against one Anderson, who had previously been committed to await its action.

The grand jurors answered, setting up matters which they claimed constituted a defense to the alternative writ. A demurrer to the answer was overruled, and, the plaintiff declining to proceed or plead further, the writ was dismissed, and the plaintiff appeals.

About the time the transcript was filed, or soon thereafter, the grand jury was discharged, so that it is now impossible for the court to enforce a judgment against it, if one should be rendered. A grand jury is temporary in its character, and, when discharged, becomes *functus officio*, and thus differs from a permanent office. An appellate court, like every other judicial tribunal, is empowered to decide actual controversies only, and not to give opinions upon mooted questions, or mere abstract propositions of law. The rule is general, therefore, that when an event occurs pending an appeal which renders it impossible for the court to grant the relief sought, it will not proceed to final judgment, but will dismiss the appeal (*Jacksonville School Dist. v. Crowell*, 33 Or. 11, 52 Pac. 693; *Moores v. Moores*, 36 Or. 261, 59 Pac. 327; *California v. San Pablo & T. R. Co.* 149 U. S. 308, 13 Sup. Ct. 876; *Mills v. Green*, 159 U. S. 651, 16 Sup. Ct. 132; *People ex rel. v. Common Council of City of Troy*, 82 N. Y. 575); and, as said by the Supreme Court of the United States, in *California v. San Pablo & T. R. Co.* 149 U. S. 308, 13 Sup. Ct. 876, "no stipulation of parties or counsel, whether in the case before the court or in any other case can enlarge the power or affect the duty of the court in this regard." The appeal will therefore be dismissed.

DISMISSED.

Argued 12 September, decided 8 October, 1900; rehearing denied 4 February, 1901.

LAW TRUST SOCIETY v. HOGUE.

[62 Pac. 380, 68 Pac. 690.]

INCREASED INTEREST AFTER DEFAULT NOT USURY.

A note payable at a stated time with a given rate of interest, and providing that in default of payment of either principal or interest the principal should bear a higher rate of interest from the date of the note, will not be considered usurious unless it appears that the parties intended to avoid the law, but such additional interest will be considered as a penalty for nonpayment.

ABATEMENT—RULE OF PLEADING.

A defendant attempting to plead *nul tiel* corporation in abatement will be held to the technical rules governing such a plea.

ANSWER—ALLEGATION ON INFORMATION AND BELIEF.

An averment in an answer that defendant has no knowledge or information sufficient to form a belief as to whether an allegation of the complaint is true, is not a denial within the purview of Section 72, Hill's Ann. Laws, and does not raise an issue: *Robbins v. Baker*, 2 Or. 52, and *Sherman v. Osborn*, 8 Or. 68, distinguished.

(Headnotes by the court.)

From Washington : THOS. A. McBRIDE, Judge.

This is a suit to foreclose a mortgage. The transcript shows that the defendants Harvey A. Hogue and Sarah L. Hogue, his wife, on September 1, 1892, gave to the Jarvis-Conklin Mortgage Trust Co. their promissory note for \$6,600, payable in five years, with interest thereon at the rate of five and one-half per cent. per annum, payable semiannually, and stipulated therein that, if either principal or interest remained unpaid ten days after maturity, the principal should draw interest from date at the rate of eight per cent. per annum; and to secure the payment thereof they executed to said company a mortgage on the donation land claim of Edward S. Sexton and wife in Washington County, Oregon, containing six hundred and forty acres, and covenanted therein that they would pay all taxes that might be levied on said land, and that if they should fail in this respect the holder of said note might pay the same, and the money so paid should be a

lien on the premises, and draw interest at the rate of eight per cent. per annum from the date of such payment, which mortgage was duly recorded in said county. The defendants paid the interest on said note for two and one-half years, and no more; and, having neglected to pay the taxes levied on said land, plaintiff has paid on account thereof the sum of \$233.10. The complaint alleges that on September 1, 1892, and thereafter, the Jarvis-Conklin Mortgage Trust Co. was and is a corporation organized and existing under the laws of the State of Missouri, and doing business in the State of Oregon; that the plaintiff, the Law Guarantee & Trust Society, Limited, of London, England, is a corporation organized and existing under the laws of Great Britain; and that said company, for a valuable consideration, assigned said note and mortgage to plaintiff, which prays for a decree foreclosing the mortgage, and a recovery of the principal, with interest at the rate of eight per cent. per annum since September 1, 1892, less the sum of \$907.50 paid on account thereof, the said sum of \$233.10, and a reasonable sum as attorney's fees. Henry Jones and Rosetta, his wife, were made parties defendant; the plaintiff alleging that they had or claimed some right or interest in the mortgaged premises, but that such right or interest, if any, was subsequent and inferior to the lien of said mortgage. The defendant Henry Jones filed an answer in the nature of a plea in abatement, alleging that he had no knowledge or information sufficient to form a belief as to whether the Jarvis-Conklin Mortgage Trust Co. was or is a corporation, and in the same manner sought to controvert the allegations of the complaint respecting the assignment of said note and mortgage, and of plaintiff's corporate existence. The defendants Hogue and wife in their answer make the same allegations on information and belief, and also allege that

they executed said note in pursuance of a fraudulent agreement entered into with the mortgagee, whereby the latter, or the holder of said note, was to receive a greater rate of interest than is allowed by law. The reply having put in issue the allegations of new matter in the plea and answer, a trial was had, resulting in a decree as prayed for, except that interest at five and one-half per cent. per annum only was allowed from the time of default; and the defendants Hogue and Henry Jones appeal.

AFFIRMED.

For appellants there was an oral argument by *Mr. Sanderson Reed*, with a brief over the names of *William W. Thayer*, *Lawrence A. McNary*, and *Reed & Hogue*.

Where a corporation is formed by direct legislative enactment the charter of an incorporation granted by a foreign country or sister state must be proved like any other foreign law: (*Morawetz*, Priv. Cor. § 39; *United States Bank v. Stearns*, 15 Wend. 134; *Savage v. Russell*, 84 Ala. 103); but where the corporation is formed under a general law, proof of the law has necessarily to be made, and then that the conditions necessary to confer the franchise have been complied with: *Morawetz*, Priv. Corp. § 4; *Mokelumne Hill Mining Co. v. Woodbury*, 14 Cal. 424 (73 Am. Dec 658.).

A judicial record to be admissible in evidence in the courts of this state must be duly authenticated in the manner prescribed by Section 731, Hill's Ann. Laws: *In re Clayton's Will*, 24 Or. 542 (34 Pac. 358).

To entitle such documents to be admitted in evidence under the common law—if a foreign document—there were three essential elements necessary: (1) The certificate of the officer having the custody of such record or document; or (2) its exemplification by affixing the

great seal of the state to the copy : 1 Am. & Eng. Enc. Law (1 ed.), 1020, 1021.

In addition to the articles of association or incorporation of an alleged foreign corporation—duly authenticated—it is necessary to show by a duly exemplified copy the act of the legislature under which the alleged corporation is alleged to have been organized or chartered and is authorized thereby to transact the particular business it alleges it has entered into : *United States v. Amedy*, 24 U. S. (11 Wheat.) 392.

A consular certificate is not admissible to prove a law, a judicial record, or a fact concerning a public document of record in a foreign state, and such certificate is not evidence : *Church v. Hubbard*, 6 U. S. (2 Cranch), 187.

The issues sought to be made by defendants, and actually tried in the lower court, were that plaintiff is not a corporation and has no right to sue ; that plaintiff's assignor was not a corporation ; that the alleged assignment was void and plaintiff has no title to the note and mortgage sued upon, and that said note and mortgage are usurious and void. The defendant Henry Jones filed an answer in which, by way of plea in abatement, he alleged "that he has no knowledge or information sufficient to form a belief as to whether or not the plaintiff is a citizen or subject of a foreign state, to wit : Great Britain and Ireland, or duly or at all organized or existing under or by virtue of the laws of Great Britain," and so on through the allegation concerning the existence of plaintiff, and in similar language tendered issues of the existence of the Jarvis-Conklin Co., the assignment by said company to the plaintiff, and the right of plaintiff to foreclose the mortgage. Defendants Hogue, in their answer to the merits, allege "that they have no knowledge nor information sufficient to form a belief as to whether the plaintiff is a citizen or subject of any foreign

state, or is duly or at all organized or existing under or by virtue of any law or laws of Great Britain, or otherwise, or at all," and tendered an issue in similar language as to all the facts alleged concerning plaintiff's existence or incorporation and rights in the suit, the existence of the Jarvis-Conklin Mortgage Trust Co., the alleged assignment of the mortgage by the Jarvis-Conklin Mortgage Trust Co., and its right to do business, etc. These answers in abatement and in bar are sufficient to make the issues sought to be made by them: *Robbins v. Baker*, 2 Or. 52; *Sherman v. Osborn*, 8 Or. 67; *Cumins v. Lawrence County*, 1 So. Dak. 158 (46 N. W. 182); *Farmers' Bank v. Charlotte Board of Aldermen*, 75 N. C. 45; *Mehan v. Harlem Savings Bank*, 5 Hun, 439, 440 (1875); *Grocers' Bank v. O'Rorke*, 6 Hun, 18 (1875); *Minde v. Oskaloosa*, 55 Iowa, 207 (1880); *Whittman v. Watry*, 37 Wis. 238, 241; Bliss, Code Pl. (3 ed.) § 325.

The following authorities are not in conflict with the proposition above stated: *Pomeroy*, Code Rem. (3 ed.) § 640; Bliss, Code Pl. (3 ed.) § 326; *Gas Co. v. San Francisco*, 9 Cal. 453; *Curtis v. Richards*, 9 Cal. 33; *Humphreys v. McCall*, 9 Cal. 59, 62 (70 Am. Dec. 621).

The decision of the Supreme Court of Oregon in the cases of *Robbins v. Baker* and *Sherman v. Osborn* has become a rule of practice, which on the doctrine of *stare decisis* should not be departed from: *Willits v. Walter*, 32 Or. 411, 417 (52 Pac. 24); *Talbot v. Garretson*, 31 Or. 256, 268 (49 Pac. 978); *Lewis Printing Co. v. Reeves*, 26 Or. 445 (38 Pac. 622).

The sufficiency of the answers in bar and in abatement was never questioned in the court below. No demurrer to either was filed. The issue was recognized as having been made by the answers, and the suit was tried upon that theory. Defendant Jones offered to take up his plea in abatement first, but by agreement of the attorneys all

the questions were tried together. The court in its decision held "that plaintiff is a corporation in all respects as alleged in the complaint." The sufficiency of a pleading to make an issue sought to be raised by it and tried below cannot be raised for the first time on appeal: *Minard v. McBee*, 29 Or. 225 (44 Pac. 491); *Bennett v. Minott*, 28 Or. 339, 345 (44 Pac. 283); *Mitchell v. Taylor*, 27 Or. 377, 389 (41 Pac. 119); *Rayburn v. Davisson*, 22 Or. 247 (29 Pac. 791).

The amount of money loaned on the note and advanced on the security taken was \$5,956.40 and no more. The complaint asks for a decree upon the following allegation: "That there is due the plaintiff the sum of \$6,600.00 as principal named in said note, with interest thereon from September 1, 1892, at the rate of eight per cent. per annum, less the sum of \$907.50 heretofore paid on account of interest;" in other words, the plaintiff herein asks for a decree for the return of \$5,956.40, the amount loaned, and interest at eight per cent., and in addition thereto the further sum of \$643.60, which it is not shown the plaintiff ever owed, and it is proven and admitted the defendant never got, and also interest upon said fictitious sum of \$643.60. This exceeds ten per cent., the rate limited, and is such excessive interest as is forbidden by section 3589 of our statutes.

The contract is: "This note is to draw interest from date at the rate of eight per cent. per annum, if either principal or interest remain unpaid ten days after due." We submit this contract is positive and clear; it is not in the alternative; it is not at any one's option. The interest having remained unpaid ten days, the whole amount bears interest from date: the interest having remained unpaid ten days, the rate of five and one-half per cent. disappears and the rate is eight per cent. from date. Nothing is said about penalty. The contract pro-

vides for either five and one-half or eight per cent., but not interchangeably, nor at the same time, nor at any one's option, nor at any one's will. It provides for a rate of interest to be paid at all events and exclusive of any other arrangement upon a condition, and the condition has disappeared and the rate has become certain and exists.

The purchaser of a note or contract made in violation of an express provision of section 3589 has nothing to forfeit; the note being illegal and void in its inception, it never had any legal existence, and the purchaser never had any property in it: *Chapman v. State of Oregon*, 5 Or. 434. See, also, *Barger v. Taylor*, 30 Or. 228 (47 Pac. 618).

The "corrupt intent" sometimes referred to is an intention knowingly to contract for or take usurious interest—but ignorance of the law will not protect a party from the penalties of usury, as it is merely a statutory offense: *Krumseig v. Mo. Kan. & T. T. Co.* 71 Fed. 352, 77 Fed. 32; *Missouri, K. & T. T. Co. v. Krumseig*, 19 Sup. Ct. 181; *Trust Co. v. McLachan*, 59 Minn. 468. There is no issue made as to whether any penalty or damages were contracted for; no issue of law raised in any way, and no issue of fact on which evidence could be introduced.

For respondent there was a brief over the names of *E. F. Riley* and *E. E. Savage*, with an oral argument by *Mr. Riley*.

MR. JUSTICE MOORE, after stating the facts, delivered the opinion of the court.

It is contended by defendant's counsel that the evidence introduced at the trial is insufficient to establish the corporate existence of the Jarvis-Conklin Mortgage Trust Co. or of the plaintiff, and that the court erred in finding otherwise, while plaintiff's counsel insists that the transcript fails to show that Jones has any substantial interest in the result of the suit, and hence his plea is a nullity; that said plea and answer do not deny, but only allege upon information and belief, a lack of knowledge respecting the incorporation of said company and society, and therefore the allegations of the complaint in these particulars are not put in issue thereby; that proof of the existence of a corporation cannot be demanded by parties who have entered into a contract with it; and that said answer, so far as it attempts to controvert the existence of the corporation, is in the nature of a plea in abatement, which, being joined with an answer to the merits, amounts to a waiver of said plea. The evidence shows that Jones is the equitable owner of the mortgaged premises, for whom Hogue probably holds the legal title in trust; and, having been made a party defendant, he undoubtedly had the right to set forth by answer as many defenses as he had: Hill's Ann. Laws, § 73. Our statute, in prescribing the manner of controverting the allegations of a complaint, so far as applicable herein, is as follows: "The answer of the defendant shall contain (1) a specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief:" Hill's Ann. Laws, § 72. It will be remembered that the plea and answer do not deny any knowledge or information concerning the incorporation of the Jarvis-Conklin Mortgage

Trust Co. or of plaintiff, unless the defendants' allegations that they have no knowledge or information thereof sufficient to form a belief shall be construed as a denial. In *Flood v. Reynolds*, 13 How. Prac. 112, under a statute of New York which permitted a defendant in certain cases to deny that he had any knowledge or information sufficient to form a belief, it was held that an allegation by the defendant that he had no knowledge or information of a material allegation of the complaint sufficient to form a belief was a compliance with the requirements of the statute. Mr. Justice HARRIS, in speaking of the defendant's averment, says: "He had a right, therefore, instead of denying the truth of the allegation, to put its truth in issue, by asserting that he could not say whether it was true or not, because he had no knowledge or information on the subject from which he could form a belief. He was not bound to go through with the idle ceremony of denying the truth of the allegation, after having asserted that he had no belief whatever whether it was true or not." In *Grocers' Bank v. O'Rorke*, 6 Hun, 18, it is said: "It has been held in various cases that an answer alleging that defendant has no knowledge or information sufficient to form a belief makes a complete denial." See, also, *Meehan v. Harlem Sav. Bank*, 5 Hun, 439.

The allegations of the plea and answer were not denials of any knowledge or information of a material allegation of a fact in the complaint sufficient to form a belief (*Cumins v. Lawrence County*, 1 S. D. 158, 46 N. W. 182); but under the rule that in the interpretation of a pleading, for the purpose of determining its effect, its allegations shall be liberally construed, with a view of substantial justice between the parties (*Hill's Ann. Laws*, § 84; *Jackson v. Jackson*, 17 Or. 110, 19 Pac. 847; *Corbett v. Wrenn*, 25 Or. 305, 35 Pac. 658; *Wyatt v. Wyatt*, 31 Or. 531, 49 Pac. 855), such allegations, in my opinion, are

equivalent to denials, and put in issue the allegations of the complaint controverted thereby. If it be assumed that a party who enters into a contract with an alleged corporation in the use of, and within the scope of, corporate powers and franchises, is estopped to deny its corporate existence in a suit by the *de facto* corporation to enforce the contract (7 Am. & Eng. Enc. Law [2 ed.], 668; 1 Thompson, Corp. § 518; Bliss, Code Pl. [3 ed.] § 252); that the execution of the promissory note by Hogue and wife to the Jarvis-Conklin Mortgage Trust Co. is sufficient evidence of its corporate existence (*Woodson v. Bank of Gallipolis*, 4 B. Mon. 203; *Depew v. Bank of Limestone*, 1 J. J. Marsh. 378; *Gaines v. Bank of Mississippi*, 12 Ark. 769); that the obligation created by the estoppel binds the party making it, and all persons privy to him (8 Enc. Pl. & Prac. 6; *Jackson-Sharp Co. v. Holland*, 14 Fla. 384); that Jones sustained that relation to Hogue and wife; and that the estoppel relied upon is apparent from an inspection of the complaint, thus avoiding the necessity of specially pleading it,—the rule invoked is inapplicable, because the plaintiff failed to demur to the answer and plea, thereby waiving the estoppel (8 Enc. Pl. & Prac. 9; *Trimble v. State*, 4 Blackf.* 42; *Love v. Kidwell*, 4 Blackf. 553; *Collins v. Mitchell*, 5 Fla. 364; *Smith v. Whitaker*, 11 Ill. 417; *Bartholomew v. Candee*, 14 Pick. 167; *Oregonian Ry. Co. v. Oregon Ry. & Nav. Co.* 10 Sawy. 464, 22 Fed. 245). A plea of *nul tiel* corporation imposes upon the plaintiff the burden of proving its corporate existence, but whether it should be considered as a plea in abatement or in bar has been the subject of much controversy. In *Oregonian Ry. Co. v. Oregon Ry. & Nav. Co.* 10 Sawy. 464 (22 Fed. 245), Mr. Justice DEADY, in speaking of such a defense, says: "A corporation may exist for many purposes, and yet not have capacity to sue in a particular case, and a plea in abatement is the proper

mode of taking advantage of that fact ; but the defense of a want of corporate existence goes further, and may be pleaded either in abatement or bar. But the latter is the most effective, and unless the matter is specially pleaded, as in abatement, it will be considered in bar or to the merits." In *Guaga Iron Co. v. Dawson*, 4 Blackf. 202, it was held that a plea of *nul tiel* corporation was a plea in bar. To the same effect, see Bliss, Code Pl. (3 ed.) § 248 ; *Christian Society v. Macomber*, 3 Metc. (Mass.), 235. Such plea does not suggest a better writ, thereby lacking one of the essential elements of a plea in abatement ; and as it tends to defeat, and not to postpone, the action, we think the better reason supports the theory that a plea of *nul tiel* corporation goes to the merits, and is a plea in bar, and, this being so, Hogue and wife did not waive such defense by joining it with a plea to the merits.

The issue thus presented being material, and, as I believe, properly pleaded, the question is whether the evidence introduced at the trial was sufficient to establish the corporate existence of the mortgagee and its assignee. Plaintiff's counsel offered in evidence what purport to be copies of the articles of incorporation of the Jarvis-Conklin Mortgage Trust Co., and a certificate of its corporate existence issued November 3, 1888, by Michael K. McGrath, the then Secretary of State of the State of Missouri, to the effect that said company had become a body corporate, with all the rights and privileges granted to trust companies under the laws of the State of Missouri, and certified to November 30, 1897, by A. A. Lesuer, Secretary of State of that state, and attested by his official seal. There was also introduced in evidence what purports to be a printed copy of the memorandum of incorporation of the Law Guarantee & Trust Society, Limited, adopted April 11, 1888, and amended in part March 13, 1895, which amendment appears to have been approved

April 27, 1895, by a decree of the high court of justice, in the chancery division, said articles and amendment being certified to by Walter S. Bates, assistant secretary, and each certified to as "a true copy" by J. S. Purcell, registrar of joint stock companies, and certificates appended thereto, issued May 6, 1897, by said registrar, to the effect that said society was incorporated under the companies' acts of 1862 to 1886, as a limited company, on April 11, 1888, and that said society had by special resolution altered its objects, which alteration was confirmed by order of the high court of justice April 27, 1895, and that a copy of said order, and a printed copy of the memorandum of association so altered, were registered pursuant to the companies' act of 1890 on May 10, 1895. There is also appended the certificate of Patrick A. Collins, Consul General of the United States for Great Britain and Ireland at London, and attested by his official seal, to the effect that the signature of J. S. Purcell, subscribed to the annexed certificates, is the true and proper handwriting of J. S. Purcell, C. B., inland revenue office, registrar of joint stock companies; that the "companies' registration office" in London has no official seal; and that, to all acts signed as the annexed, full faith and credit are and ought to be given in judicature and thereout. The laws of the State of Missouri and the companies' acts of Great Britain of 1862 to 1886 and of 1890, referred to in the secretary's and registrar's certificates, were not offered in evidence.

Judge Thompson, in his work on Corporations (section 220), in speaking of the manner of proving the existence of a corporation, says: "If it is a corporation created by a foreign statute, the statute must be proved as a fact, in the mode prescribed by the law of the forum for the proof of foreign laws. If the statute is a special law of a foreign state, the mode of proving it will usually be by an ex-

amplified copy, certified by the Secretary of State, or otherwise authenticated as provided by the act of congress. If the corporation is organized under a general law of another state of the Union, it will usually be sufficient, under the rules of evidence in most of the states, statutory or resting in adjudged cases, to prove it by the production of a book of the statutes of such other state, which purports on its face to be published by the authority of such state." In *United States Bank v. Stearns*, 15 Wend. 314, Mr. Chief Justice SAVAGE, in speaking of the character and degree of evidence required in such cases, says: "The least proof which has been held sufficient is the production of an exemplification of the act incorporating the plaintiffs, and evidence of user under their charter." In *Savage v. Russell*, 84 Ala. 103 (4 South. 235), it was held that a foreign corporation whose existence was denied must show not only the papers and proceedings of incorporation, but the statute of the sister state authorizing such incorporation. In *Eagle Works v. Churchill*, 2 Bosw. 166, it was held that the certificate of the Secretary of State of a sister state was sufficient to prove the existence of a corporation, provided that due proof of the statute under which the corporation was organized was also made. The plaintiff, having neglected to offer in evidence books printed or published under the authority of the State of Missouri and of Great Britain, and purporting to contain the general laws under which the Jarvis-Conklin Mortgage Trust Co. and plaintiff were probably incorporated, and the latter's articles amended (Hill's Ann. Laws, § 725), failed to establish the *de facto* existence of said company and society: *State v. Savage*, 36 Or. 191 (60 Pac. 610).

Another question to be considered is that of usury. Our statute provides, in effect, that on contracts interest at the rate of ten per cent. per annum may be charged,

by express agreement of the parties, and no more, and if it shall be ascertained in any suit brought on any contract that a rate of interest has been contracted for greater than so authorized, either directly or indirectly, the same shall be deemed usurious, and shall work a forfeiture of the entire debt so contracted to the school fund of the county where such suit is brought: Hill's Ann. Laws, §§ 3587, 3589. The trial court, upon the issue under consideration, found, in effect, that it was calculated and understood by the lender and borrowers at the time the note was executed that the sum of \$5,956.40, with interest at the rate of eight per cent. per annum for five years, was equal in amount to the sum of \$6,600 for the same term at the rate of five and one-half per cent. per annum; that there was no agreement to pay or receive usurious interest; and that the two and one-half per cent. additional interest stipulated for in case of default was in the nature of a penalty, which the defendant might avoid by making payment of the interest and principal when they severally matured,—but refused to enforce such penalty; and, the plaintiff not having appealed therefrom, the only question to be considered is whether such finding is justified by the terms of the note. In *Union Trust Co. v. Hagood* (C. C.), 97 Fed. 360, Mr. Justice SIMONTON, in promulgating a rule for determining whether a stipulation for the payment of an increased rate of interest in case of default constitutes usury, or is only a penalty, says: "If, from the contract, it appears that the parties, when making it, understood that the words of the note were not peremptory, but that the maker would be indulged, provided he paid the increased rate of interest, this would be usury; but if the threat of increased interest was held out to enforce prompt payment, and if the increased rate was penalty for the default, it would not be usury."

In *Lawrence v. Cowles*, 13 Ill. 577, an action to recover on a promissory note, with interest after maturity at the rate of ten per cent. per annum, the statute permitting only six, it was held that the increased rate of interest was in the nature of a penalty to secure the punctual payment of the debt, the court saying: "It was in the power of the maker to avoid the payment of interest altogether, by the prompt payment of the principal. Where, by the terms of a contract, a party can discharge himself by paying the real amount due, the transaction is not obnoxious to the statute against usury." In *Cutler v. How*, 8 Mass. *257, it was held that where, by the terms of a contract, the party may, by payment at a day certain, avoid any stipulated penalty, such contract is not usurious. To the effect that a stipulation is a contract to pay after maturity a greater rate of interest than that prescribed by law is a penalty only, and not usurious, see 27 Am. & Eng. Enc. Law (1 ed.), 994; *Ramsey v. Morrison*, 39 N. J. Law, 591; *Gower v. Carter*, 3 Iowa, 244 (66 Am. Dec. 71); *Wilson v. Dean*, 10 Iowa, 432. In *Wilday v. Morrison*, 66 Ill. 532, it was held that where a promissory note provides that, if the principal is not paid when due, a greater rate of interest shall be paid than is allowed by law, and it is made payable on so long a time as not to induce the belief that the interest clause was intended as an evasion of the statute, it will not be held to be usurious from such fact alone. The note being payable five years after its execution leads us to believe that the stipulation to pay the increased rate of interest after maturity was intended as a penalty, and not to evade the statute; and, this being so, there was no error in said finding of the court below.

For the failure to make proof of the corporate existence of the mortgagee and its assignee, the decree, in my opinion, ought to be reversed, and the suit dismissed

without prejudice: Hill's Ann. Laws, § 403. My associates, however, are of the opinion that the answer of defendant Jones is insufficient as a plea in abatement, because it does not allege, either positively or upon information and belief, that the plaintiff is not a corporation. Having attempted to plead *nul tiel* corporation in abatement, the sufficiency of his answer must be determined by the technical rules governing such a plea, and must contain a full and direct averment of all material facts necessary to constitute it: 1 Enc. Pl. & Prac. 23. The answer of the defendant Hogue is insufficient to put in issue the corporate existence of either the plaintiff or the Jarvis-Conklin Mortgage Trust Co., because it does not deny the allegations of the complaint touching their incorporation. Our statute requires the answer to contain a specific denial of each material allegation controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief: Hill's Ann. Laws, § 72. Under this provision, a mere affirmative averment that the defendant has no knowledge or information sufficient to form a belief concerning a material matter alleged in the complaint is not a denial, and presents no issue for trial: Pomeroy, Code Rem. (3 ed.) § 640; Bliss, Code Pl. (3 ed.) § 326; *San Francisco Gas Co. v. City of San Francisco*, 9 Cal. 453. The New York cases heretofore referred to were decided under a statute authorizing either a general or specific denial. At common law a direct traverse is made by an affirmation the contrary to that of the opposite party. Hence it was entirely proper for the courts of New York to hold that an affirmative allegation would amount, in effect, to a denial. But our statute requires a specific denial, and since the answer of defendant Hogue does not deny the corporate existence of the plaintiff or of the Jarvis-Conklin Mortgage Trust Co., either positively or upon

information and belief, no issue upon that question was presented for trial. Therefore the error, if any, in the admission of evidence tending to prove their corporate existence was immaterial. The decree is therefore affirmed.

AFFIRMED.

Decided 4 February, 1901.

ON PETITION FOR REHEARING.

MR. JUSTICE WOLVERTON delivered the opinion.

By a supplemental petition for rehearing, filed since the original was denied, it is insisted that the holding of the court to the effect that a mere affirmative averment of defendants' want of knowledge or information sufficient to form a belief concerning a material matter alleged in the complaint is not a good denial, and presents no issue, is opposed to two former decisions of this court, namely, *Robbins v. Baker*, 2 Or. 52, and *Sherman v. Osborn*, 8 Or. 66. These cases are not referred to in the opinion, and, to the end that we may not be misunderstood, we have deemed it advisable to state our position more fully. For their answer the defendants Hogue and wife "allege that they have no knowledge nor information sufficient to form a belief as to whether the plaintiff is a citizen or subject of any foreign state, or is duly or at all organized or existing under or by virtue of any law or laws of Great Britain, or otherwise, or at all," and "allege that they have no knowledge nor information sufficient to form a belief as to whether the Jarvis-Conklin Mortgage Trust Co. is, or ever was, a corporation organized or existing under or by virtue of the laws of the State of Missouri, or otherwise, or at all." These are the allegations held to be insufficient to put the question of the incorporation of these two supposed corporations at issue. In *Robbins v. Baker*, 2 Or. 52, the court states the question under con-

sideration as follows: "The answer in this case does not declare absolutely that the defendant has no knowledge of the matter controverted, but denies that he has sufficient knowledge to make up an opinion or form a belief;" and it was held that the form of expression used in the answer conveyed the same meaning as though the language of the statute had been followed. The form of the answer was neither discussed nor determined. In *Sherman v. Osborn*, 8 Or. 66, the denial was as follows: "But whether the defendant * * * was at the time * * * a nonresident of the State of Oregon, plaintiff has no knowledge or information thereof sufficient to form a belief, and therefore denies said allegation," and the court held it sufficient, citing *Robbins v. Baker*, 2 Or. 52. It will be observed that this was an allegation that the plaintiff had no knowledge or information sufficient to form a belief as to whether, etc., followed by the clause, "and therefore denies the same." In later cases it has been held that a denial of any knowledge or information sufficient to form a belief as to the existence of a particular fact is good under the code: *Wilson v. Allen*, 11 Or. 154 (2 Pac. 91); *Colburn v. Barrett*, 21 Or. 27 (26 Pac. 1008). So that by prior decisions of this court two forms of expression may be used in constructing a denial. One follows the statute literally, being a denial of any knowledge or information, etc., and the other is by affirming a negative that he has no knowledge or information, etc., followed by the expression, "and therefore denies the same." We are not aware that any other form of denial upon information or belief has the sanction of this court. It will be noted that in each of these forms there is a denial, which, although not a literal, is a substantial compliance with the statute. The statute, which, according to text writers and the weight of authority, should be exactly followed,

has prescribed the requisites of this species of denial; and, while the affirmation of the negative, followed by the expression "and therefore denies the same," has received the sanction of some courts, yet it must be conceded that a mere affirmative, without being accompanied by any form of denial, is by no means an exact compliance therewith, and, in our opinion, is not permissible: *Pomeroy*, Rem. (3 ed.) § 640; *Phillips*, Code Pl. § 364; *The Holladay Case* (C. C.), 27 Fed. 830, 841; *Claflin v. Reese*, 54 Iowa, 544 (6 N. W. 729). REHEARING DENIED.

Argued 13 September; decided 8 October, 1900.

HENRY v. YAMHILL COUNTY.

[62 Pac. 375.]

SALARIES AND APPOINTMENT OF DEPUTY SHERIFFS—SHERIFFS.

1. The sheriffs of the several counties have under the act of 1895 (Laws, 1895, p. 77, §§ 4 and 5), power respectively to appoint the number of deputies provided for in that act, who shall be respectively entitled to the salaries there named, but other deputies must be appointed and their compensation fixed by the county courts under section 11 of said act.

CLAIM FOR SALARY IS A PERSONAL RIGHT.

2. The claim of a deputy sheriff for the salary allowed him by law is a personal right, to be enforced in his own name, and not by his superior, unless the claim has been assigned.

From Yamhill: GEO. H. BURNETT, Judge.

Action by J. W. Henry to recover from Yamhill County the amount of his deputy's salary, in which a demurrer to the complaint was sustained. AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. John J. Spencer*.

For respondent there was a brief over the names of *Samuel L. Hayden*, District Attorney, and *James McCain*, with an oral argument by *Mr. McCain* and *Mr. John H. McNary*.

MR. JUSTICE WOLVERTON delivered the opinion.

J. W. Henry, while acting as Sheriff of Yamhill County, Oregon, brought this action to recover the salary of his deputy, and, a demurrer to his complaint having been sustained, judgment was rendered against him, dismissing the action, from which he appeals. The controversy involves a construction of the amendatory act of February 25, 1895 (Laws, 1895, p. 77), regulating the compensation and mode of payment of sheriffs and other county officers. Section 4 provides that "the sheriffs of the several counties in this state shall receive an annual salary, as follows: Baker, \$2,000; Baker (first deputy), \$1,200; Baker (second deputy), \$900; Benton, \$2,000; * * * Yamhill, \$2,000; Yamhill (deputy), \$600. * * * The Sheriff of Multnomah County may appoint as many deputies as the county court of said county shall by order authorize, one of which deputies shall be paid at the rate of \$1,800 per year, and the others at such rate as said county court shall by order direct, not exceeding \$1,200 per year." Section 5 provides that "the salaries herein provided for in favor of the said county clerks * * * and sheriffs, shall be audited and paid by the several counties to the respective parties entitled thereto, in monthly payments, and in the same manner that other county charges are paid, and no one of such officials shall be entitled to receive any fees or other compensation for his services than as above provided and except as hereinafter provided." And section 11, that "whenever any county clerk, recorder of conveyances, clerk of the circuit court or county court herein referred to, or sheriff, appoints a deputy, it shall be the duty of such official to report the same to the county court of his county, which court shall enter in its minutes the said report, and if the said court is of the opinion that

the services or any part thereof of such deputy should be paid by the county it shall fix the amount thereof to be paid by the county by an order, duly entered, specifying the same, which amount shall be so paid by the county in the same manner as other county charges are paid, as before mentioned." Section 993, Hill's Ann. Laws, empowers the sheriff to appoint a deputy, and requires him to file a certified copy of the appointment with the county clerk, and that the appointee shall, before entering upon the duties of his office, take and file an oath of office with such clerk. This section should not be lost sight of in construing the statute under discussion. It is a cardinal rule of interpretation that a statute should be so construed as to give effect to every clause, or part thereof, if possible, and to reject none unless it is clearly repugnant to some declaration which, by reason of its unmistakable intendment or later utterance, should be preferred as indicative of the legislative will. In the language of Section 694, Hill's Ann. Laws, our province "is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted or to omit what has been inserted; and, where there are several provisions or particulars, such construction is, if possible, to be adopted as will give effect to all."

1. The statute under consideration provides annual salaries for the sheriffs of the several counties, concerning which the legislative intendment is plain. Deputies are also provided for in some of the counties. Baker and Union are given a first and second deputy; others are given "one deputy," and still others, as in Yamhill, have the designation "deputy" set opposite, followed by a specified sum, while, as it respects Marion County, the term "deputies" is employed. It is quite natural to suppose that the term "sheriffs" is used in section 4 in a generic sense, thus including the sheriffs and their

deputies, and that the intendment was to fix the compensation of both. The idea is strengthened by the fact that section 1 provides for the salaries of county clerks, and section 3 for recorders of conveyances, in identical language, accompanied by a list of counties, with similar designation of deputies and specific sums set opposite. Section 2 provides for the salaries which the clerks of the circuit and county courts and their deputies are to receive in the counties of the state where such offices exist, separate and apart from the office of county clerk, and the latter clauses of sections 3 and 4 provide specifically for the compensation of the recorder and sheriff and one deputy for each county, while additional deputies are to be paid at such rates as the county court may direct, not exceeding \$1,200 per annum. Section 5 provides for the auditing and payment of the salaries of county officers, who are therein also designated by the generic term, which must be held to include deputies, else there is no provision for the payment of such deputies in counties where there exist the separate offices of clerk of the circuit and county courts, or in Multnomah County. We take it, therefore, that section 4, construed in connection with section 993, Hill's Ann. Laws, gives ample authority to the sheriff to appoint such deputies as are designated in the list, and that section 5 provides for their payment by the county at the rate named in said list. Is the language of section 11 so repugnant to this idea as to deprive such deputies of compensation, except such as shall be fixed by the county court? The phraseology of the first clause is very broad and sufficiently comprehensive to include within its purview all deputies appointed by the officers named; but the latter clause having directed that the amount so fixed "shall be so paid by the county in the same manner as other county charges are paid, as before mentioned," would

seem to indicate that it was not intended to include such charges as are theretofore provided for, and this we believe to be the purpose of the latter section. Such charges, therefore, as are previously provided for do not fall within its purview; in other words, section 11 has reference solely to the deputies appointed by their principals, other than those expressly authorized by sections 1 to 4, inclusive. It appears to us that this is the only reasonable solution of the problem presented, and that it is in entire consonance with the intendment of the legislature.

2. The sheriffs, however, are not entitled to recover the salaries of their deputies. Such demands are personal, and should be made in the name of the deputies themselves, unless duly assigned. In this particular the complaint fails to state a cause of action, and the demurrer thereto was properly sustained. **AFFIRMED.**

Argued 1 October; decided 15 October, 1900.

BOYD v. PORTLAND ELECTRIC COMPANY.

[62 Pac. 373, 7 Am. Electl. Cas. —.]

87 567
89 486**TRIAL—IMPROPER REMARKS OF COUNSEL—RULING THEREON.**

1. To secure a consideration of the alleged misconduct of counsel before the jury there must have been some erroneous ruling of the trial judge in relation thereto; thus, where an attorney was interrupted by his opponent because it was claimed he was making statements not supported by the testimony, and such statements were not set out in the record, and the judge instructed the jury to disregard matters not in evidence, error assigned on such comments will not be considered on appeal, since it was not based on any erroneous judicial action of the trial court: *State v. Abrams*, 11 Or. 160, followed; *State v. Hatcher*, 29 Or. 300, distinguished.

FALLEN ELECTRIC WIRE*—REASONABLE CARE—QUESTION FOR JURY.

2. In an action for injuries occasioned by a live electric wire which had been blown down in a storm, an instruction that the defendant company could not excuse a delay in replacing such wire on the ground that they did not have a sufficient force to replace it sooner was erroneous, since the question whether the company exercised reasonable care was for the jury.

From Multnomah: **ERASMUS D. SHATTUCK**, Judge.

This is an action by William Everett Boyd, by R. B. Boyd, his guardian *ad litem*, against the Portland General Electric Co. to recover damages for an injury to

*NOTE.—On the question of the liability to persons in public highways for injuries by live wires, see the following list of annotated cases: *Southwestern Tel. Co. v. Robinson*, 4 Am. Electl. Cas. 342, 16 L. R. A. 545; *Ahern v. Oregon Teleph. Co.* 22 L. R. A. 685, 4 Am. Electl. Cas. 349; *Haynes v. Raleigh Gas Co.* 26 L. R. A. 810, 5 Am. Electl. Cas. 284, 41 Am. St. Rep. 786; *Block v. Milwaukee St. Ry. Co.* 27 L. R. A. 365, 46 Am. St. Rep. 849, 5 Am. Electl. Cas. 288; *Denver Consol. Elec. Co. v. Simpson*, 5 Am. Electl. Cas. 278, 31 L. R. A. 566, 25 Am. St. Rep. 242; *City Elec. St. Ry. Co. v. Conery*, 31 L. R. A. 570, 54 Am. St. Rep. 262, 6 Am. Electl. Cas. 217; *Western Union Tel. Co. v. State to use of Nelson*, 6 Am. Electl. Cas. 210, 31 L. R. A. 572, 51 Am. St. Rep. 464; *Mitchell v. Charleston Lt. & Power Co.* 31 L. R. A. 577, 6 Am. Electl. Cas. 245; *Huber v. La Crosse City Ry. Co.* 31 L. R. A. 583, 58 Am. St. Rep. 940, 6 Am. Electl. Cas. 285; *McKay v. Southern Bell Teleph. Co.* 31 L. R. A. 589, 6 Am. Electl. Cas. 223, 56 Am. St. Rep. 59; *Snyder v. Wheeling Electl. Co.* 39 L. R. A. 499, 64 Am. St. Rep. 922; *Mooney v. Luzerne Bonough*, 40 L. R. A. 811; *Gannon v. Laclede Gas Light Co.* 43 L. R. A. 505; *Electric Ry. Co. v. Shelton*, 24 Am. St. Rep. 614, 3 Am. Electl. Cas. 477; *Suburban Elec. Co. v. Nugent*, 6 Am. Electl. Cas. 238; *Atlanta Consol. St. Ry. Co. v. Owens*, 6 Am. Electl. Cas. 271, 38 L. R. A. 798; *Tezakana Light Co. v. Orr*, 5 Am. Electl. Cas. 272, 43 Am. St. Rep. 30; *Western Union Tel. Co. v. Thorn*, 5 Am. Electl. Cas. 233; *Kankakee Elec. Ry. Co. v. Whittemore*, 4 Am. Electl. Cas. 362; *City of Albany v. Watervliet R. R. Co.* 4 Am. Electl. Cas. 367; *Graham v. City of Boston*, 4 Am. Electl. Cas. 372.

The following cases are based on the alleged negligence of electric companies in maintaining wires in or on buildings or other structures whereby persons not

plaintiff from an electric light wire. The defendant is a corporation, engaged in supplying the City of Portland and its inhabitants with electric light, for which purpose it has erected poles in the streets, with arms near the top bearing the wires which transmit the electricity. During the afternoon and night of December 6, 1897, a violent wind and rain storm, prevailing in Portland and vicinity, prostrated defendant's lines in many places. In Woodlawn, a suburb of the city, about 6 or 7 o'clock in the evening, one of the wires stretched over Magnolia Street parted at a point about one hundred and twenty feet west of Dakota Street, and, crossing over the other wires, hung down in two loops, one of which swung near the ground, about two or three feet west of the pole at the intersection of the streets. About 8 o'clock on the morning of the seventh, plaintiff, who was eleven years of age, and resided with his father on Dakota Street, about two hundred feet south of its junction with Magnolia, was sent on an errand requiring him to pass near the light pole at the corner. A few minutes later he was discovered lying on

servants of such companies were injured by an electric shock while properly about the premises: *Clements v. Louisiana Elec. Light Co.* 32 Am. St. Rep. 348, 4 Am. Electl. Cas. 381, 16 L. R. A. 43; *Illingsworth v. Boston Elec. Light Co.* 25 L. R. A. 552, 5 Am. Electl. Cas. 312; *Hector v. Boston Elec. Light Co.* 5 Am. Electl. Cas. 300, 75 Am. St. Rep. 300, 25 L. R. A. 551; *Giraudi v. Electric Improv. Co.* 48 Am. St. Rep. 114, 28 L. R. A. 506, 5 Am. Electl. Cas. 318; *Griffin v. United Elec. Light Co.* 49 Am. St. Rep. 477, 31 L. R. A. 400, 6 Am. Electl. Cas. 252; *McLaughlin v. Louisville Elec. Light Co.* 6 Am. Electl. Cas. 255, 34 L. R. A. 812; *Perham v. Portland Elec. Co.* 72 Am. St. Rep. 780, 40 L. R. A. 799; *Brown v. Edison Elec. Illum. Co.* 46 L. R. A. 745; *Brush Elec. Light Co. v. Lefevre*, 49 L. R. A. 771; *Newark Elec. Light Co. v. Garden*, 6 Am. Electl. Cas. 275, 37 L. R. A. 725; *Fennis v. Gray*, 5 Am. Electl. Cas. 325; *McMullen v. Edison Elec. Illum. Co.* 5 Am. Electl. Cas. 332; *Augusta Ry. Co. v. Andrews*, 4 Am. Electl. Cas. 378.

Duty of electrical companies to their employees—Electric shocks: *Colorado Elec. Co. v. Lubbers*, 7 Am. St. Rep. 255, 2 Am. Electl. Cas. 361; *Myhan v. Louisiana Elec. Light Co.* 17 Am. St. Rep. 436, 7 L. R. A. 172; *Western Union Tel. Co. v. McMullen*, 32 L. R. A. 351, 6 Am. Electl. Cas. 338; *McAdam v. Central Ry. & Elec. Co.* 6 Am. Electl. Cas. 348; *Harroun v. Brush Elec. Light Co.* 6 Am. Electl. Cas. 357; *Junior v. Missouri Elec. Power Co.* 5 Am. Electl. Cas. 369; *Kraatz v. Brush Elec. Light Co.* 3 Am. Electl. Cas. 491.

Right of a traveler to recover for injuries resulting from attempting to remove obstructing wire from a public highway: *Bourget v. City of Cambridge*, 4 Am. Electl. Cas. 374, 16 L. R. A. 605.—REPORTER.

the ground immediately under the broken wire, in an insensible condition, his right hand badly burned, and the back of his head so burned that the flesh thereafter sloughed off, leaving a circular space, about three inches in diameter, bare to the skull. No one witnessed the accident, and the plaintiff was unable to give any account of how it occurred, but it is agreed that it was caused by contact with the broken wire. It is alleged in the complaint, among other things, that defendant did not exercise due care and diligence in replacing and taking care of the wire after it had parted on the evening of the sixth, and is therefore liable for the injury suffered by the plaintiff. The answer denies the negligence charged, and for an affirmative defense alleges contributory negligence. The trial resulted in a verdict in favor of the plaintiff for \$5,000, which was reduced by the trial court to \$2,500, and a judgment entered accordingly. The defendant appeals, assigning as error the misconduct of plaintiff's counsel, and the giving and refusal of certain instructions by the trial court. REVERSED.

For appellant there was a brief over the name of *Dolph, Mallory & Simon*, with an oral argument by *Mr. Rufus Mallory*.

For respondent there was a brief over the name of *Dufur & Menefee*, with an oral argument by *Mr. E. B. Dufur*.

MR. CHIEF JUSTICE BEAN, after stating the facts, delivered the opinion of the court.

1. During the trial, one Leonard C. Jones testified in behalf of defendant, and was cross-examined by plaintiff's attorney. Thereafter, and before the close of the trial, plaintiff applied to the court for leave to recall the

witness for further cross-examination. An objection was made, during the consideration of which counsel stated that he desired to recross-examine the witness in reference to his connection with an accident insurance company and its relation to the defendant. The court denied the application, and refused to permit the witness to be recalled. The record further shows that, during the closing argument of counsel for the plaintiff, he was interrupted by the defendant's counsel, who said: "What is that? I understand counsel to say that Jones was representing an insurance company that indemnified this company. If he said that, he deserves to be reprimanded for it. There is not a word of testimony here on that subject. He has no right to make such a statement in the presence of the jury. He had not concluded his statement, but made an allusion to the subject before I caught him up on it. He did say that he (Jones) belonged to an insurance company that indemnified this company." The court thereupon instructed the jury to disregard matters not in evidence. The record does not contain the statements of counsel to which objection was made, and their purport can only be inferred from the objection itself. It is insisted, however, that his conduct, as disclosed by the record, is reversible error. It has been repeatedly held by this court that error must be predicated upon some decision of the trial court, and therefore, as a general rule, an objection to statements made by counsel during the argument presents no ground for review in the appellate court unless the trial court was requested to rule thereon, and did so adversely to the complaining party. The question arose in *State v. Anderson*, 10 Or. 448, where it is said that "improper comments of counsel, either in a civil or criminal case, will not of themselves justify a reversal of judgment, under our system. They must be connected upon the

record with error of the court, to produce such a result; and, as no such error is shown here, the alleged exception cannot be sustained." Again, in *State v. Abrams*, 11 Or. 169 (8 Pac. 327), it is said: "We have announced this principle before, * * * and we now lay it down, as a rule to which there can be no exceptions, that no objection to proceedings in the court below can be heard in this court which is not based on alleged error in judicial action on the part of the lower court." See, also, *State v. Hatcher*, 29 Or. 309 (44 Pac. 584). In the case at bar, the remarks of counsel did not receive the sanction or approval of the trial court, but, on the contrary, it declined to permit him to proceed, and, in effect, instructed the jury to disregard any statements made in reference to facts not in evidence, and therefore, within the doctrine of the cases cited, the matter presents no question for review on appeal. It may be true that the conduct of an attorney in going out of the record, and stating facts to the jury not in evidence, may be so reprehensible and so manifestly intended to mislead the jury as to be ground for reversal, even if the trial court should direct the jury to disregard what he said on the subject: *Smith v. Western Union Tel. Co.* 55 Mo. App. 626; *Waldron v. Waldron*, 156 U. S. 361 (15 Sup. Ct. 383), 39 L. Ed. 453; *McHenry Coal Co. v. Sneddon*, 98 Ky. 684 (34 S. W. 228). But this case presents no such features. There is nothing to indicate that the conduct of counsel was in any way improper or intended to unduly influence the jury. As already said, his language is not contained in the record; but, whatever it may have been, it no doubt was uttered in the heat of argument and without any intentional wrong on his part. In such case, it is not only the right, but the duty, of the trial court, when called upon, to correct the error into which counsel has fallen,

and when it does so, as a general rule, the cause of reversal is thereby removed.

2. The principal question on the trial was whether the defendant was negligent in not removing the broken wire. Plaintiff insisted that it was negligence to allow the wire to remain thirteen hours after it fell before taking care of it, while defendant contended that it exercised the utmost diligence in repairing the damages to its system caused by the storm, but was unable to reach the wire in question prior to the accident. The court, after stating to the jury the respective positions of the parties, and that whether the defendant had exercised reasonable care and diligence in the matter was a question of fact for their determination, further instructed them as follows: "The suggestion is made that they (defendant company) had not sufficient force to carry on this work, to raise all these fallen wires, as early, perhaps, as they ought to have done; but companies of this sort, dealing with one of the most subtle and powerful agencies known to man, cannot plead want of assistance and amount of expense as an excuse for any dilatoriness whatever. The law requires reasonable care, and reasonable care must be determined by all the circumstances attending the transaction—what took place at the time, what took place before." And, again: "Reasonable care in such matters means the utmost care and skill which a man is capable of exercising, considering the immediate circumstances in hand. So it must be, then, that if there was not sufficient force in order to prevent dangers that might arise from fallen wires, if you find from the testimony in the case that the defendant was negligent or dilatory in raising the wires that had fallen, that considerable time elapsed after it was broad daylight the next morning before the agents, servants of the company, made their appearance to repair the wires, you will con-

sider that question in connection with the question of damages and upon the issue of negligence." It is insisted, and we think properly, that this instruction imposed a higher degree of duty, as a matter of law, upon the defendant company than is exacted of it.

An electric light company that has erected its poles and wires in the streets of a municipality, with the consent of the proper authorities, is not an absolute insurer against accident therefrom. It is only bound to exercise care and diligence in the erection and maintenance of its system proportionate to the danger: *Croswell, Electricity*, § 236; *Keasbey, Electric Wires* (2 ed.), § 236, *et seq.*; *Denver Consol. Elec. Co. v. Simpson*, 21 Colo. 371 (31 L. R. A. 566, with note; 41 Pac. 499)—and when it has fulfilled this duty it has discharged its entire obligation, and its liability ceases. The question of whether or not it has exercised reasonable care is for the jury to decide upon the facts of each particular case, except when reasonable minds could not possibly differ in their conclusions upon the facts. The amount of care necessary, of course, varies with the danger which is incurred by negligence; and, in determining the question, it is proper for the jury to take into consideration the location of the lines, whether in a thickly or sparsely settled portion of the municipality, the use to which they are to be put, the harmless or dangerous nature of the current to be transmitted over them, their remoteness or proximity to travelers on the highway, and any other circumstances affecting the case. But where, as the evidence here tends to show, the wires of a company supplying a city of the size and area of Portland have been prostrated in numerous places at the same time by reason of an unusual and unexpected storm, it is imposing upon the company a duty not required by any of the decisions to say that it cannot show, as an excuse for a delay in taking care of a

particular wire in a suburban part of the city, the want of assistance sufficient to immediately repair all the damages caused by the storm. Whether the defendant company had in its employ a large enough force of men to meet the emergency, and whether its want of assistance was an adequate excuse for its delay in not sooner taking care of the wire which caused plaintiff's injury, were proper matters for the consideration of the jury in determining the question whether it had exercised reasonable care and diligence; but it was not the province of the court to say, as a matter of law, that want of assistance was no excuse for the delay. That question belonged to the jury, not to the court. It follows that the judgment must be reversed, and a new trial ordered.

REVERSED.

Decided 13 August, 1900.

STITES v. MCGEE.

[61 Pac. 1129.]

POWER TO VACATE CONSENT DECREE.

1. After the expiration of the term during which it has been entered, a consent decree cannot be attacked or impeached in any manner except by an original bill.

APPEAL FROM VOID ORDER.

2. Where a court had no power to enter an order it is void and may be appealed from: *Deering v. Quivey*, 28 Or. 558, cited.

From Josephine: HIERO K. HANNA, Judge.

This is an appeal from an order opening a consent decree, made on motion and affidavits after the expiration of the term at which it was entered. The facts are fully stated in the opinion.

REVERSED.

For appellants there was a brief and an oral argument by *Messrs. Geo. W. Colvig and Davis Brower*.

For respondents there was a brief and an oral argument by *Mr. James R. Neil*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

In August, 1896, W. C. Stites and another, claiming to be the owners by prior appropriation of one hundred and sixty inches of water from Munger Creek, in Josephine County, brought a suit to enjoin Jas. O. McGee and others from interfering with their use thereof. Before an answer had been filed or issue joined, the parties, for the purpose of settling the controversy, stipulated in writing that the plaintiffs are the owners and entitled to the prior use of one hundred and forty inches of the waters of the stream, measured under a six-inch pressure, to be delivered in the channel sixteen and one-half feet below McGee's dam, through a box on a grade of one-fourth inch to the rod, to be constructed and maintained by the defendants, and that a decree be entered accordingly. Thereafter, and on the thirtieth of September, 1896, the respective parties appeared in court by their attorneys, and, "consenting and agreeing" thereto, a decree was duly entered in accordance with the stipulation, which was recorded in full in the journal, and made a part of the decree. At a subsequent term, but within a year after the rendition of the decree, the defendants moved to set it aside and for permission to answer, on the ground that the stipulation was made and their consent to the decree given under a mutual mistake of the parties as to the actual quantity of water flowing in the channel of the creek at the defendant's dam. This motion was allowed, and the plaintiffs appeal.

1. In support of the ruling of the court below it is argued that this case is governed by Section 102 of Hill's Ann. Laws, which provides that the court may "in its

discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect." The decree in question, however, was not taken against the defendants through any of the causes enumerated in the statute, but was rendered with their knowledge and by their express consent, and hence does not come within the provisions of the section referred to. True, it is alleged that the stipulation or contract which forms the basis of the decree was entered into through the mutual mistake of the parties, but it is not claimed that there was any mistake or inadvertence about the decree itself. Whether the stipulation expresses the true and actual intent and agreement of the parties is a question which can be determined only in a proper proceeding instituted for that purpose and upon testimony given in the regular way. It is certainly not a proper subject of inquiry on an *ex parte* motion to vacate the decree. Indeed, a consent decree is not, in a strict legal sense, a judicial sentence or judgment of the court, but is in the nature of a solemn contract between the parties. When a decree is made by the consent of the parties, the court does not inquire into the merits or equities of the case. The only questions to be determined by it are whether the parties are capable of binding themselves by consent, and have actually done so. These two facts appearing, the court orders a decree to be entered, and when thus entered, showing on its face that it is by consent, it is absolutely conclusive upon the consenting parties. It cannot be amended or varied in any way without the consent of all the parties affected by it; nor can it be reheard, vacated, or set aside by the court rendering it, especially after the expiration of the term; nor can it be appealed from or reviewed upon a writ of

error. The only way it can be attacked or impeached after the expiration of the term, whatever the rule may be during the term, is by an original bill, on the ground of fraud or mutual mistake: 5 Enc. Pl. & Prac. 960; Gibson, Suits in Ch. § 558; 2 Beach, Mod. Eq. Prac. § 853b; 2 Daniel, Ch. Prac. (6 Am. Ed.) *974; *Stump v. Long*, 84 N. C. 616; *Elder v. National Bank of Lawrence*, 12 Kan. 242; *Thompson v. Maxwell*, 95 U. S. 391, 24 L. Ed. 481; *Manion v. Fahy*, 11 W. Va. 482; *Morris' Adm'r v. Peyton's Adm'r*, 29 W. Va. 201 (11 S. E. 954); *Attorney-General v. Tomline*, 7 Ch. Div. 388.

2. The court below, therefore, had no power or authority to set aside or vacate the decree on motion after the expiration of the term, and its order attempting to do so is consequently void and reviewable on appeal: *Deering v. Quivey*, 26 Or. 556 (38 Pac. 710). The decree of the court below is reversed.

REVERSED.

Argued 24 July; decided 13 August, 1900.

EMISON v. OWYHEE DITCH COMPANY.

[62 Pac. 13.]

INSTRUCTION—ABSTRACT PROPOSITION.

1. It is reversible error to instruct a jury on an abstract proposition of law material to the case, when there is no evidence on that point: *Pearson v. Dryden*, 28 Or. 350, applied.

CONTRIBUTORY NEGLIGENCE—OVERFLOWING LAND.

2. Though the plaintiff, by her method of irrigation, caused surface water to accumulate on her low land, she could nevertheless recover against another for discharging quantities of water thereon and increasing her injury.

ALTERNATIVE PLEADING—MOTION.

3. It is always bad pleading to state facts hypothetically, alternatively or conditionally, though the authorities are not uniform as to the proper motion to correct the fault.

ERRORS MUST BE ASSIGNED.

4. To secure a consideration by the supreme court of an alleged error, the action or omission complained of must be assigned as error.

From Malheur: MORTON D. CLIFFORD, Judge.

37 OR.—37.

This is an action by Mary N. Emison against the Owyhee Ditch Co. to recover damages for the loss of crops alleged to have been caused by the defendant's negligence in permitting water from its ditch to overflow plaintiff's lands. It is alleged in the complaint that the defendant owns and operates a ditch in Malheur County, Oregon, and is engaged in furnishing water to its customers for irrigation; that the plaintiff is the owner in fee of certain lands in said county, across the south end of which the defendant maintains and operates a waste way from its main ditch to conduct the surplus water therefrom; that in 1897, 1898, and 1899 the defendant so negligently constructed, maintained, and operated said waste way that the water escaped therefrom and overflowed plaintiff's lands, to her damage in the sum of \$1,075. The answer, having denied the material allegations of the complaint, averred "that heretofore, in the year 1896, the plaintiff, the K. S. D. Fruit-Land Co., the Nevada Ditch Co., and this defendant entered into a joint agreement, contract, and undertaking for the construction of a waste way or waste ditch from the Owyhee ditch, on the section line between Clark and the K. S. D. Fruit-Land Co. and the lands of the plaintiff, east to Snake River slough; that in pursuance of said agreement, contract, and undertaking, the said parties, jointly operating together, and for their mutual benefit and advantage, did proceed with the construction of said waste way or waste ditch as aforesaid, and did so build and construct the waste way or waste ditch mentioned and referred to in plaintiff's complaint; that, if any damage has been occasioned to any of the lands or crops of the plaintiff, it has so been caused, not by the acts, negligence, or conduct of the defendant, but by either the Nevada Ditch Co., the K. S. D. Fruit-Land Co., by the plaintiff herself, or by all of said parties." The reply having put in issue

the allegations of new matter in the answer, a trial was had, resulting in a judgment for the defendant, and plaintiff appeals.

REVERSED.

For appellant there was a brief over the names of *Wm. H. Packwood, Jr., John L. Rand, and R. G. Wheeler:*

For respondent there was a brief over the names of *William Miller and Lionel R. Webster.*

MR. JUSTICE MOORE, after stating the facts, delivered the opinion of the court.

1. An exception having been taken to the following instruction, it is contended by plaintiff's counsel that the court erred in giving it, to wit: "There is one other matter, gentlemen of the jury, that I desire to call your attention to, and that is, there is one place in this answer where the defendant alleges that, if any damage was occasioned to the lands of plaintiff, it was occasioned by the surplus water used by the plaintiff in irrigating. In other words, that is in the nature of contributory negligence,—that the plaintiff herself contributed to the damage. And, in that respect, I charge you that if the plaintiff, by carelessness or negligence in the management or care of her property, caused or contributed to her own damage, if she suffered any damage, she cannot recover any such damages in this action, and I instruct you that you should find for the defendant; that is, if any damages have been occasioned by her (the plaintiff) contributing to the damage herself." The testimony produced by plaintiff tends to show that she has, near the southern boundary of her farm, about fifteen acres of low land, which in 1897, 1898, and 1899 was covered for a short time each year with water from the defendant's waste way to a depth of from six inches to two feet,

destroying the crop thereon, and producing the injury of which she complains. She irrigates her crops by flooding the higher land with water, which is permitted to flow down upon and moisten the low tract, towards which about forty acres of her farm gradually slopes. Prior to the construction of the defendant's waste way in 1897, goods crops of alfalfa had been raised on this low land, upon a small part of which the water had once been known to accumulate. Plaintiff's witnesses testified that, while the seepage from the irrigation of the farm moistened, it did not supply too much water to, the low land, and that there was no surface water to be disposed of. Several witnesses called by defendant testified that they had irrigated land in the vicinity of plaintiff's farm, and that, in their experience, such land could not be irrigated without producing some seepage or waste water; and one witness, speaking of his own farm, said he was obliged to provide a means for the waste water to escape. The defendant called one Mulder as a witness, who testified that he was employed in 1897 and 1898 to irrigate plaintiff's land, and that the seepage water accumulated on the south end of the field, until it had all the water and probably more than was necessary. On his direct examination he was asked, "Was there some trouble about the accumulation of water on that low place?" to which he replied, "Not to my knowledge." On cross-examination, in answer to the question, "Was the water which stayed upon that bottom there caused by the water you used in irrigating the surrounding land, or was it caused from other sources?" he said, "I don't think that it was, nor that I caused the killing of the alfalfa."

This is the substance of the evidence respecting the surface water, and it will be seen that no testimony was introduced tending to show that the plaintiff's method of irrigating her farm caused the water flowing from the

higher land to appear on the surface of the low tract during 1897, 1898, or 1899. If the volume of surface water which overflowed the low land be regarded as the test of contributory negligence, the testimony fails to show that the plaintiff was responsible for any part thereof. The rule is well settled that when the court, in the absence of any evidence thereof, instructs the jury respecting a matter that is material to the cause, the charge is necessarily misleading and erroneous: *Breon v. Henkle*, 14 Or. 494 (13 Pac. 289); *Glenn v. Savage*, 14 Or. 567 (13 Pac. 442); *Woodward v. Oregon Ry. & Nav. Co.* 18 Or. 289 (22 Pac. 1076); *Knahtla v. Oregon Short Line Ry. Co.* 21 Or. 136 (27 Pac. 91); *Pearson v. Dryden*, 28 Or. 350 (43 Pac. 166). The instruction complained of not having been predicated upon any testimony, the court erred in giving it.

2. The plaintiff had the undoubted right to irrigate her farm in any manner that suited her fancy, so long as she did not injure others in the enjoyment of this right, and, if it had appeared that her method of irrigation caused surface water to accumulate on her low land, such fact would not justify the discharge of quantities of water thereon to augment her injury; and, notwithstanding she may have been injured in part by her own act, the defendant would be liable, at least in nominal damages, if by its carelessness the overflow of her land was increased, and hence the instruction was improper, even if it had been warranted by the testimony. In *Moakler v. Willamette Val. Ry. Co.* 18 Or. 189 (6 L. R. A. 656, 17 Am. St. Rep. 717, 41 Am. & Eng. R. R. Cas. 135, 22 Pac. 948), this court adopted from 4 Am. & Eng. Enc. Law (1 ed.), 17, the following definition: "Contributory negligence is a want of ordinary care upon the part of a person injured by the actionable negligence of another, combining and concurring with that negligence, and con-

tributing to the injury, as a proximate cause thereof, without which the injury would not have occurred." The plaintiff did not open the gate in defendant's waste way, nor break its ditch, thereby causing the water to overflow her premises, nor could she have prevented the injury by the exercise of ordinary care; and hence the instruction was erroneous in principle.

3. It is insisted by plaintiff's counsel that the court erred in overruling their motion to strike out the allegation in the answer to the effect that, if any damage was sustained by overflowing said land, it was occasioned by the plaintiff or the companies designated, on the ground that the averment is alternative and hypothetical. The rule is general that such a form of stating material facts in a pleading is bad: Heard, Steph. Pl. *387. "Such a pleading," says the editor of the Encyclopedia of Pleading and Practice (volume 6, p. 269), "is subject to a motion to make more definite and certain under the codes." In a note to section 317 in Bliss on Code Pleading (3 ed.), the author says: "The remedy for hypothetical pleadings is by motion to strike out."

4. Whatever the mode may be of correcting the vice in the pleading complained of, it is not necessary to consider; for the action of the court in overruling the motion, not having been assigned as error in the notice of appeal, must be treated as waived. It follows that the judgment is reversed, and a new trial ordered.

REVERSED.

Argued 1 November; decided 26 November, 1900.

EWING v. RHEA.

[62 Pac. 790.]

LICENSE—ACQUIESCENCE AS AN ESTOPPEL.

The fact that defendant's grantors silently acquiesced in the construction by plaintiff, at considerable expense, of an irrigating ditch across their lands, did not estop defendant, prior to the expiration of the period of limitation, from cutting off the supply of water, plaintiff's right being a bare license, revocable at will: *Lavery v. Arnold*, 36 Or. 84, and *Hallock v. Suttor*, 37 Or. 9, followed; *Curtis v. La Grande Water Co.* 20 Or. 34, overruled on this point.

From Morrow: STEPHEN A. LOWELL, Judge.

This is a suit by W. B. Ewing against C. A. Rhea to enjoin interference with an irrigating ditch. It is substantially alleged in the complaint that plaintiff is in possession, and entitled to the possession, of certain arid land in the north half of section 17, in township 2 north, of range 23 east, in Morrow County, Oregon; that in 1891, at an expense of \$510, he constructed a ditch from the bank of Willow Creek, at a point in the north half of section 20, in said township and range, in a northerly direction, across the south half of said section 17, to his premises, whereby he diverted water from said creek, which was thereafter continuously used, except as hereinafter stated, in irrigating his land; that when the ditch was dug the land in said section 20 was claimed, under the timber culture act, by one T. H. Rhea, who thereafter secured from the United States a patent therefor, and on March 31, 1898, conveyed it to the defendant; that in 1891 the south half of said section 17 was claimed, under acts of congress, by the Northern Pacific Railroad Co., which, in 1896, transferred all its interest therein to the Northern Pacific Railway Co., and the latter, in 1898, agreed to sell and convey said land to the defendant, who is in possession thereof; that T. H. Rhea and the Northern Pacific Railroad Co. knew of and acquiesced in the

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444	200
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construction of said ditch, and that they and the Northern Pacific Railroad Co. at all times stood by and saw plaintiff, who relied upon such knowledge and acquiescence, expend large sums of money in constructing said ditch and in improving his premises; that notwithstanding the defendant, prior to securing T. H. Rhea's deed, knew that said ditch had been constructed, and that the water conducted therein had been continuously used in irrigating plaintiff's land, he, in April, 1898, willfully destroyed said ditch south of plaintiff's land, thereby depriving him of the use of the water. The court having sustained a demurrer to the complaint, dismissed the suit, and plaintiff appeals.

AFFIRMED.

Mr. S. A. D. Gurley for appellant.

Mr. C. E. Redfield for respondent.

MR. JUSTICE MOORE, after stating the facts, delivered the opinion of the court.

The question to be considered is whether a complaint alleging a passive acquiescence by defendant's predecessors, when they knew that plaintiff was expending large sums of money in making valuable improvements upon his land while relying upon the faith of the implied license to maintain said ditch, which, if revocable, would render such improvements valueless, states facts sufficient to constitute a cause of suit. Plaintiff's counsel contends that the complaint is sufficient in this respect, and that the court erred in sustaining the demurrer; and relies upon the case of *Curtis v. La Grande Water Co.* 20 Or. 34 (23 Pac. 808, 25 Pac. 378, 10 L. R. A. 484), in which it appears that in 1865 the company's predecessor, with the consent and assistance of one Green Arnold, built a dam across a creek, and laid a pipe therefrom, by which water

was diverted and conducted to the City of La Grande for the use of its inhabitants. Mrs. Curtis, the plaintiff therein, in 1876 acquired by *mesne* conveyances from Arnold the title to a tract of land through which said creek flowed, and in 1887 the company, without her express consent, built a new dam across the creek about one thousand feet above the old one, and, taking up the conduit, relaid it from the new dam, and resumed the supply of water thereby. Mrs. Curtis having instituted a suit to enjoin the diversion, it appeared at the trial that the company changed the point of diversion under a claim to the use of the water which it believed was well founded; that Mrs. Curtis, with knowledge of such claim, stood by without asserting any right to have the undiminished flow of the stream continue in the natural channel until she had seen the company expend large sums of money in improving its property, which, without the use of the water at the new point of diversion, would be rendered valueless, whereupon it was held that by her passive acquiescence she was estopped from asserting any right to the uninterrupted flow of the water in the creek. In *Garrett v. Bishop*, 27 Or. 349 (41 Pac. 10), it was held that the evidence of an irrevocable license should be clear and convincing, and show a permission to do the particular act performed, or some participation in its execution by the alleged licensor. In *Lavery v. Arnold*, 36 Or. 84 (57 Pac. 906), it was held that a passive acquiescence was insufficient to create an estoppel; the court saying: "But such license must result from some consideration paid by the licensee, or some benefit accruing to the licensor; otherwise, a person entitled to the use of water might be deprived thereof by seeing a neighbor constructing a ditch, making no objection thereto until the water was diverted, under an honest belief that he intended to use only the surplus."

So, too, in *Hallock v. Suitor*, 37 Or. 9 (60 Pac. 384), it

was held that a riparian owner upon a stream who made no objection when informed by a lower riparian proprietor that he intended to build a dam on her land was not estopped by any failure to assert her right, and that such passive acquiescence was not equivalent to a license to construct the dam. A license of this character is an authority to do some act or series of acts on the land of another for the benefit of the licensee without passing any estate in the land: *Christensen v. Pacific Coast Borax Co.* 26 Or. 302 (38 Pac. 127); *Stinson v. Hardy*, 27 Or. 584 (41 Pac. 116). "A license," says Mr. Justice LORD, in *Curtis v. La Grande Water Co.* 20 Or. 34 (23 Pac. 808, 25 Pac. 378, 10 L. R. A. 484), "creates no interest in land. It is founded on personal confidence, and is not assignable; and its continuance depends on the pleasure of the party giving it, and is revocable unless executed under such circumstances as would authorize the interference of equity to prevent injustice." The rule is well settled in this state that if a party has paid a consideration therefor, or been encouraged by any participation in a common enterprise, or induced by a definite oral agreement to expend money in making permanent valuable improvements, the parol license upon the faith of which he has acted in executing it cannot be revoked to his prejudice: *Coffman v. Robbins*, 8 Or. 279; *Huston v. Bybee*, 17 Or. 140 (20 Pac. 51, 2 L. R. A. 568); *Combs v. Slayton*, 19 Or. 99 (26 Pac. 661); *Curtis v. La Grande Water Co.* 20 Or. 34 (23 Pac. 808, 25 Pac. 378, 10 L. R. A. 484); *Baldock v. Atwood*, 21 Or. 73 (26 Pac. 1058); *McBroom v. Thompson*, 25 Or. 559 (37 Pac. 57, 42 Am. St. Rep. 806); *Garrett v. Bishop*, 27 Or. 349 (41 Pac. 10); *Bowman v. Bowman*, 35 Or. 279 (57 Pac. 546); *Lavery v. Arnold*, 36 Or. 84 (57 Pac. 906); *Hallock v. Suitor*, 37 Or. 9 (60 Pac. 384); *Miser v. O'Shea*, 37 Or. 231 (62 Pac. 491). While frequent trespasses upon the track of a railroad company, of which it

had no knowledge, does not create a license to use the track as a footpath (*Ward v. Southern Pac. Co.* 25 Or. 433, 36 Pac. 166, 23 L. R. A. 715, 60 Am. & Eng. R. R. Cas. 34), it must be conceded, we think, that a mere naked license by acquiescence may be created in favor of a person or the public by his or its use of real property or an easement therein without the owner's objection (*Cederson v. Oregon R. R. & Nav. Co.* 62 Pac. 637); but a license of that character, unless enjoyed for such a time as to bar the statute of limitations, may be revoked at any time at the pleasure of the licensor: *Carskaddon v. Mills*, 5 Ind. App. 22, 31 N. E. 559; *Parish v. Kaspere*, 109 Ind. 586, 10 N. E. 109; *Simpson v. Wright*, 21 Ill. App. 67; *Pitzman v. Boyce*, 111 Mo. 387, 33 Am. St. Rep. 536, 19 S. W. 1104. We do not think that upon principle a mere naked license, which is predicated upon an invasion of another's right, and is, in effect, a trespass upon his property, so encourages a party to act upon the faith of the implied permission as to render it irrevocable, even when money has been expended in improving property under a belief that the uninvited use relied upon will never be interrupted; and, in so far as the decision in *Curtis v. La Grande Water Co.* 20 Or. 34 (23 Pac. 808, 25 Pac. 378, 10 L. R. A. 484), is in conflict with the principle here announced, it is overruled. Upon this theory the complaint did not state facts sufficient to constitute a cause of suit, and, no error having been committed in sustaining the demurrer, the decree is affirmed.

AFFIRMED.

Decided 30 July; rehearing denied 22 October, 1900.

BELLE v. BROWN.

[61 Pac. 1024.]

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RES JUDICATA—CONCLUSIVENESS OF JUDGMENT.

1. Judgments and decrees are conclusive as to what was actually litigated, and as to what might properly have been litigated in the proceeding, unless the failure to urge the point in question was caused by the adversary's fraud, and was without negligence of the losing party.

SUIT TO IMPEACH JUDGMENT—NATURE OF FRAUD.

2. In suits to set aside judgments or decrees, actual fraud with any intent to deceive the opposite party must be shown.

EQUITY—LIEN FOR ADVANCEMENTS—RES JUDICATA.

3. Where real property belonging to an intestate's estate has been partitioned among the heirs without actual knowledge by any of them that property conveyed by intestate to certain of their number had been conveyed as advancements, equity will not impress on the lands apportioned to such grantees a lien in favor of the other heirs for their share of the advancements, in a collateral suit, though the discovery that the conveyances were advancements was not made until after rendition of the decree in the absence of actual fraud or concealment: *Finley v. Houser*, 22 Or. 562, and *Crabill v. Crabill*, 22 Or. 588, cited.

EQUITY—SETTING ASIDE JUDGMENT—RES JUDICATA.

4. Newly discovered evidence will not justify a court in subsequently either setting aside or disregarding a judgment or decree for errors of fact that may have occurred therein.

REMEDY FOR UNEVEN ADVANCEMENTS—HOTCHPOT.

5. Equity will not assume jurisdiction of a suit to impress an equitable lien for advancements on the undistributed shares of certain heirs of an intestate in lands admeasured as dower, which have reverted to the estate, and lands conveyed to all the heirs, as tenants in common, by another heir, to whom advancements were made, since, under Hill's Ann. Laws, §§ 3104, 3105, requiring such an advancement to be brought into hotchpot, suit in partition is the only remedy.

From Marion: REUBEN P. BOISE, Judge.

This is a suit by Nancy S. Belle and others against Charles A. Brown and others to establish and foreclose an alleged equitable lien upon certain real property. The facts are that Charles Swegle conveyed to the defendants Charles A. and Frank E. Brown about fifty acres of land in Marion County, Oregon, stipulating in the deeds thereto that the premises so granted were intended as advancements to them equal to the sum of \$2,500, as the representatives of his deceased daughter. The said

grantor died intestate, leaving surviving him Lucinda Swegle, his widow, and the plaintiffs, Nancy S. Belle, George Swegle, M. W. Swegle, Olevia Holmes, Emma Bender, and Albert Swegle, his children and the defendants, his grandsons, as his heirs. His estate having been settled, the defendants secured a distributive share of the personal property thereof, without the knowledge of the administrator or the heirs that any advancements had been made; and a suit having been instituted in the circuit court for said county to partition the real property therein of which Swegle died seised, and neither party having any knowledge of such advancements, a decree was rendered setting off to each of the plaintiffs and defendants certain of said lands in severalty, and to the widow, for her natural life, 125.01 acres as her dower; but, she having died, the land so admeasured to her reverted to the parties herein. After Swegle's death there was found with his papers a deed to his daughter Emma Bender for 80.25 acres of land in said county which was not partitioned in said suit; but, the deed never having been delivered, she, with her husband, executed a deed releasing to each of her brothers and sisters an undivided one-sixth, and to each of the defendants an undivided one-twelfth, interest in said tract. The plaintiffs, having discovered that the conveyances made by their father to the defendants were intended as advancements, commenced this suit, alleging, in effect, that at the time the partition suit was instituted the defendants, well knowing that such advancements had been made, wrongfully concealed such fact, with intent to defraud the plaintiffs, who had no knowledge thereof; that the defendants have never paid any part of such advancements, six-sevenths of which is due the plaintiffs, who pray that the sum of \$2,142.85 be decreed a lien upon the defendants' interest in the lands so held by them as

tenants in common and in severalty, and that said premises be sold to satisfy said lien.

The answer, having denied the material allegations of the complaint, avers, in substance, that plaintiffs ought not to be permitted to say that the defendants had not paid the advances made to them, or that a lien should be impressed on their lands as security therefor, for that Charles Swegle, their grandfather, conveyed to each of the plaintiffs, in severalty, lands for various considerations, all of which exceeded the sum of \$2,500, no part of which had ever been paid by either of them, and that in administering on the decedent's estate no account was taken of the advances made to the defendants, for the reason that there was due from each of the plaintiffs to said estate various sums of money, which offset the advances made to the defendants, in consequence of which the personal property of the estate was distributed equally among the heirs; that plaintiffs ought not to be permitted to say that the defendants had not paid any part of said advances, for that, in a suit instituted in the circuit court for said county, in which Lucinda Swegle, Nancy S. Belle, and the said Charles A. Brown and Frank E. Brown were plaintiffs, and the plaintiffs herein, George Swegle, Olevia Holmes, M. W. Swegle, Emma Bender, and Albert Swegle, were defendants, a decree was rendered partitioning to the plaintiffs and to the defendants all the real property of which Charles Swegle died seised, except the land set off to Lucinda Swegle as her dower, and that described in the deed to Emma Bender, which decree was never appealed from or modified, and is now in full force and effect; that each of the defendants owns an undivided one-twelfth of the premises so conveyed by Emma Bender to her coheirs, the title to which they claim under and by virtue of her deed. The court having sustained a demurrer to the new matter set out in the

answer, a trial was had upon the remaining issues, resulting in a decree as prayed for, but directing that the unpartitioned lands be first sold to satisfy the lien, and that, if the amount realized therefrom should be insufficient to pay the sum of \$2,142.85, the real property of the defendants owned in severalty be sold to satisfy such deficiency, from which decree the defendants appeal.

REVERSED.

For appellants there was a brief and an oral argument by *Mr. George G. Bingham*.

For respondents there was a brief and an oral argument by *Messrs. Woodson T. Slater and Tilmon Ford*.

MR. JUSTICE MOORE, after stating the facts, delivered the opinion of the court.

It is contended by defendants' counsel that, the estate of Charles Swegle having been fully administered upon and the personal assets thereof equally distributed to his heirs, and the real property of which he died seised partitioned in a suit instituted for that purpose, the advancements made by the defendants' ancestor have become *res judicata*, and, this being so, the court erred in sustaining a demurrer to the estoppels alleged in the answer. Our statute upon the subject of advancements, so far as applicable herein, is as follows: Hill's Ann. Laws, § 3104. "Any property, real or personal, that may have been given by the intestate in his lifetime as an advancement to any child, or other lineal descendant, shall be considered a part of the intestate's estate, so far as regards the division and distribution thereof among his issue, and shall be taken by such child, or other descendant, towards his share of the intestate's estate." Section 3105. "If the amount of such advancement shall ex-

ceed the share of the heir so advanced, such heir shall be excluded from any further share or portion in the division or distribution of the estate, but shall not be required to refund any part of such advancement; and if the amount so received shall be less than his share, such heir shall be entitled to so much more as will give him his full share or portion of the estate of the intestate."

1. The testimony shows that when the personal property of the decedent's estate was distributed, and also when the real property of which he died seised was partitioned to the heirs, neither of them had actual knowledge that the deeds executed to defendants by their grandfather contained an expression that the grants so made were intended as advancements. The plaintiffs, by reason of such want of knowledge, having failed to charge the defendants with such advancements upon the settlement of said estate or in the partition suit, the question is, does the order of distribution in the probate proceedings, or the decree in partition, estop plaintiffs from maintaining this suit? The law affords to parties litigant their day in court for the enforcement of their rights or the redress of their injuries, but public policy, in the interest of the peace of society, demands that litigation should not be interminable, and, in enforcing such demand, the law limits parties to one day in court, thereby requiring them to bring forward all claims and demands properly belonging to the cause of suit or defense, as well as their evidence in support of their respective theories; and, as a corollary of this principle, courts usually hold that judgments and decrees are conclusive, not only as to what was actually tried, but also as to whatever might have been litigated: 2 Black, Judgm. § 731.

A party failing to assert a claim in a suit in equity, in which it might have been litigated with propriety,

will not be permitted afterwards to enforce it in a second suit, unless his failure to do so in the first instance was caused by the fraud of his adversary, and was not attributable to his own negligence: *Stewart v. Stebbins*, 30 Miss. 66; *Burford v. Kersey*, 48 Miss. 642.

2. In a suit to set aside a judgment or decree, the character of fraud which will justify equitable interference is not constructive, merely, but actual, and usually consists in the intentional concealment of a material and controlling fact for the purpose of misleading and taking advantage of the opposite party: *Ross v. Wood*, 70 N. Y. 8; *Ward v. Town of Southfield*, 102 N. Y. 287 (6 N. E. 660); *Mayor, etc. v. Brady*, 115 N. Y. 599 (22 N. E. 237); *Mather v. Parsons*, 32 Hun, 338; *Jones v. Jones*, 71 Hun, 519 (24 N. Y. Supp. 1031); *Rice v. Bruff*, 87 Hun, 511 (34 N. Y. Supp. 501); *Baker v. Byrn*, 89 Hun, 115 (35 N. Y. Supp. 55); *Amador Min. Co. v. Mitchell*, 59 Cal. 168.

3. Notwithstanding the deeds executed by Charles Swegle to the defendants contain recitals that the considerations expressed therein were intended as advancements, and that they might reasonably be chargeable with notice thereof, yet they had no actual knowledge that the grants were so intended by their grandfather; and, this being so, they did not, in the settlement of his estate or in the partition suit, intentionally conceal a material fact; and hence equity will not, in a collateral suit, correct or modify the former decree in so far as it may in any manner affect the title to the premises set off to them in severalty: *Morrill v. Morrill*, 20 Or. 96 (25 Pac. 362, 11 L. R. A. 155, 23 Am. St. Rep. 95); *Finley v. Houser*, 22 Or. 562 (30 Pac. 494); *Crabill v. Crabill*, 22 Or. 588 (30 Pac. 320); *Christy v. Spring Val. Waterworks*, 68 Cal. 73 (8 Pac. 849); *Doolittle v. Don Maus*, 34 Ill. 457; *Irvin v. Buckles*, 148 Ind. 389 (47 N. E. 822); *Whittemore v. Shaw*, 8 N. H.

393. It may be said that the title to the lands so apportioned to the defendants is not assailed by this suit, nor can such title be affected thereby, except so far as a failure to pay the sum charged against the property by the decree may tend to accomplish the alienation thereof. But to permit such a result to follow would, in effect, be opening up in a collateral suit the original decree in partition, which has become *res judicata*.

4. The question of actual fraud being thus eliminated, the only remaining ground for impeaching the decree of partition is the plaintiff's discovery of the fact that advances had been made to the defendants which were not taken into account in the suit for partition. The rule is well settled, however, that newly discovered evidence furnishes no ground to attack a judgment or decree, and that errors of fact in a suit in equity do not render the decree liable to be impeached in another suit: *White Water Canal Co. v. Henderson*, 3 Ind. 3; *Pease v. Whitten*, 31 Me. 117; *Wright v. Trustees*, 1 Hoff. Ch. 202. Thus, in a partition suit, if the trustee under the will of the ancestor files a petition to charge one of the heirs with advancements, and is defeated, he cannot maintain a suit against the heir to recover the advancement upon the ground of special agreement, which was not set up in the former suit: *Wright v. Miller*, 147 N. Y. 362 (41 N. E. 698); *Wright v. Miller*, 67 Hun, 649 (22 N. Y. Supp. 24). So, too, a decree fixing the amount of the distributive shares, based upon the advancement to one of the defendants, is conclusive evidence of such amount in a suit for partition: *Torrey v. Pond*, 102 Mass. 355. The defendants not having any knowledge that the real property so conveyed to them by their grandfather was intended by him as advancements, they were not guilty of any actual fraud in the partition suit, and hence the land so set off to them in severalty is freed from any claim

thereon that the plaintiffs might have litigated in that suit. It will be remembered that Emma Bender released to each of the defendants an undivided one-twelfth of the real property described in the deed which was found with her father's papers after his death, thereby conveying to each an undivided one eighty-fourth interest in said premises, more than he inherited from his grandfather. If the defendants had secured title to real property from third parties, no equitable lien could be impressed thereon to secure said advancements, and in any subsequent partition suit the plaintiffs can acquire no greater interest in the land so conveyed by Mrs. Bender than the defendants inherited therein from their grand father.

5. Any child or other lineal descendant who has received from his intestate ancestor an advancement is required to bring it into hotchpot: Hill's Ann. Laws § 3104. This does not mean that his title shall be divested, but that the value of the advancement shall be taken into consideration in making the distribution: *Jackson v. Jackson*, 28 Miss. 674 (64 Am. Dec. 114). When advancements of unequal values have been made by an ancestor in his lifetime to his children or lineal descendants, in a suit for partition of the real property inherited from him it is proper for the court first to find the value of each advancement, and require the same to be brought into hotchpot: *Pigg v. Carroll*, 89 Ill. 205. So, too, it is held that, although jurisdiction is conferred by statute on the probate court in the matter of controversies as to advancements made by the decedent to his children, yet when the jurisdiction of the chancery court has attached, under a bill for the partition of land among them, the court may, before decreeing partition, require the parties to account for these advancements, taking the same as a part of their respective shares: *Marshall v.*

County, wherein said George Jones is plaintiff, and said George Conn is defendant, and on the — day of May, 1897, the Hon. W. C. Hale, one of the judges of said court, duly made and issued an order restraining the said George Conn, his attorneys, agents, and employees, from using any of the waters of Chewaucan River, in said county, for the purpose of irrigation upon the northeast quarter of section 23, or the north one-half of the northwest quarter of section 24, in township 33 south, range 18 east, of the Willamette Meridian, in said county, and said order is still in full force; that I am informed and believe that said George Conn, in violation of said order, and with full knowledge thereof, and with the intention willfully to violate and disobey the same, has been during the past two weeks, and now is, using said waters for the purpose of irrigation upon said lands and all of them, and threatens to continue so to do, and he refuses to obey said order; that said order was duly served upon said George Conn a few days after the issuance thereof.

AUSTIN S. HAMMOND.

Subscribed and sworn to before me and in my presence this twenty-first day of June, 1898.

W. I. VAWTER,
Notary Public for Oregon."

Upon presentation of the affidavit, a citation was issued by one of the judges of the First Judicial District, requiring the defendant to appear before him at Klamath Falls on a day named to show cause why he should not be punished for contempt. Thereafter such proceedings were had that at the hearing the defendant was adjudged to be in contempt of court, and sentenced to pay a fine of \$1.00 and costs. From this judgment he appeals, assigning as error the insufficiency of the affidavit and want of jurisdiction.

REVERSED.

For appellant there was a brief over the names of Chas. A. Cogswell, W. A. Wilshire, and L. F. Conn, with an oral argument by Mr. Cogswell.

For the state there was a brief over the names of *D. R. N. Blackburn*, Attorney-General, *Chandler B. Watson*, District Attorney, and *John McCourt*, with an oral argument by *Mr. Blackburn*.

MR. CHIEF JUSTICE BEAN, after stating the facts, delivered the opinion of the court.

Our statute relating to the punishment of contempts provides that, when not committed in the immediate view and presence of the court, "before any proceedings can be taken therein the facts constituting the contempt must be shown by an affidavit presented to the court or judicial officer:" Hill's Ann. Laws, § 653. This affidavit is essential to the jurisdiction of the court in all proceedings for constructive contempts (*State v. Kaiser*, 20 Or. 50, 23 Pac. 964, 8 L. R. A. 584); and it must state facts which, if established, will constitute the offense. If it is insufficient in this respect, there is nothing to set the power of the court in motion, and it is without jurisdiction to proceed: *Works, Courts*, 492; *Wyatt v. People*, 17 Colo. 252 (28 Pac. 961), and authorities; *Batchelder v. Moore*, 42 Cal. 412; *McConnell v. State*, 46 Ind. 298. Now, a proceeding for contempt for violating an injunction is in its nature criminal (5 Cr. Law, Mag. 171; *Freeman v. City of Huron*, 8 S. D. 435, 66 N. W. 928; *Lester v. People*, 150 Ill. 408, 41 Am. St. Rep. 375, 23 N. E. 387, 37 N. E. 1004; *Wyatt v. People*, 17 Colo. 252, 28 Pac. 961); and therefore the statute must be strictly pursued (4 Enc. Pl. & Prac. 770). It requires that facts shall be stated in the affidavit, and, in our judgment, a statement that the affiant is informed and believes certain things to be true is obviously not a compliance with its provisions. Such an affidavit is not a statement of any positive fact, except the information and belief of the party making it. The statute requires more. It contemplates that the facts

constituting the contempt shall be stated in a positive manner by some one conversant therewith. Indeed, a proper regard for the liberty of the citizen forbids any proceeding by which he may be deprived of his liberty without the information furnished by such an affidavit, and so the courts hold.

In *Ludden v. State*, 31 Neb. 429 (48 N. W. 61), and *Freeman v. City of Huron*, 8 S. D. 435 (66 N. W. 928), it is held that an affidavit upon information and belief is insufficient to confer jurisdiction in a proceeding for contempt. In the former of these cases, Mr. Justice MAXWELL, speaking for the court, said: "It will be observed that the charge made by Mr. Easterday is 'that he is informed and believes that the said removal was done by the said Owen and men in his employ, and was with the permission and consent, procurement, and instance of the said Luther P. Ludden and the said W. C. Miller.' Who informed Easterday we are not told, nor upon what grounds he based his belief. His informant may have been a 'busybody,' who meddled in the affairs of others, without knowledge or judgment, and his belief may have been based on the idle statements of those who knew nothing of the matter. A proceeding in contempt for acts not committed in the presence of the court is instituted by filing an information under oath stating the facts constituting the alleged contempt. * * * The charge must be direct that the party has committed the act complained of. In all matters based on the oath of a party charging another with the commission of an offense by which he may be deprived of his liberty, the charge must be specific and direct. Mere hearsay will not do." In the latter, the holding is: "In cases of this character, the facts should be stated with certainty. Persons should not be required to answer an essentially criminal charge based merely upon the belief of a private prosecutor.

Because the affidavit did not confer jurisdiction upon the court below, its judgment is reversed." It is true that in *State v. McKinnon*, 8 Or. 487, an affidavit upon information and belief is said to be sufficient, but it would seem that the objection here made was not urged or considered. But however that may be, the judgment was reversed for want of jurisdiction in the lower court, and therefore an opinion upon any other question was not called for, and must be regarded as mere *dictum*. The judgment of the court below is reversed, and the cause remanded for such further proceedings as may be proper, not inconsistent with this opinion. REVERSED.

Argued 12 September; decided 8 October, 1900.

BLOCH v. SAMMONS.

[55 Pac. 438, 62 Pac. 290.]

AMENDING BILL OF EXCEPTIONS AFTER APPEAL.

1. Where the bill of exceptions as filed in the supreme court is incomplete or incorrect, the proper practice is to secure a proper amendment by the trial court, and then file it as part of the record on appeal. This is preferable to remitting the transcript for correction: *State ex rel. v. Estes*, 34 Or. 196, followed.

ESTOPPEL—REPRESENTATION OF TITLE—FRAUD.

2. Where one, with full knowledge of all facts, voluntarily represents to an intending purchaser of real estate that he has no interest therein, intending that such representation shall be acted upon, and the purchaser buys in consequence thereof, such conduct will estop the person who made the statements from afterward asserting title in himself, though he may have been ignorant of his rights, and may not have intended any actual fraud. In such a case fraud will be inferred: *House v. Fowle*, 22 Or. 308, distinguished.

From Multnomah: ERASMUS D. SHATTUCK, Judge.

Action by Jacob Bloch against Sarah Sammons and Jos. Hubbell to recover possession of real property. Hubbell alone defended and finally obtained a judgment.

REVERSED.

37	600
42	571
37	600
47	59
37	600
48	494

Decided 19 December, 1898.

ON MOTION TO REMIT THE TRANSCRIPT TO THE TRIAL
COURT FOR CORRECTION.

Mr. Lawrence A. McNary, for the motion.

Mr. Edw. Mendenhall, *contra*.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

1. This is a motion by respondent Hubbell to remit the transcript of the above cause to the court below for the purpose of having the bill of exceptions there corrected to conform with the facts as they occurred at the trial. The question involved is purely a matter of practice. In the case of *State ex rel. v. Estes*, 34 Or. 196 (52 Pac. 571), it was held that the bill of exceptions may be corrected in the court below, notwithstanding the cause was pending on appeal. In that case there was an amendment *nunc pro tunc* by the lower court, and thereupon the amended bill was filed here, and the question came up on motion to strike it from the record. This we refused to do, and approved the practice there adopted. We think it the better one, and therefore deny the present motion to remit the transcript. MOTION OVERRULED.

Decided 8 October, 1900.

ON THE MERITS.

For appellant there was a brief over the name of *Edw. & A. R. Mendenhall*, with an oral argument by *Mr. Edw. Mendenhall*.

For respondent there was a brief over the names of *Lawrence A. McNary* and *Fred L. Keenan*, with an oral argument by *Mr. McNary*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

This action was commenced in a justice's court to recover possession of certain real property in the City of Portland. The complaint alleges that the plaintiff is the owner, and entitled to the possession, of the property in controversy, and that defendant is in possession thereof, and unlawfully holds the same by force. The answer denies the allegations of the complaint, except defendant's possession, and for a further defense avers that he is the owner of an estate by curtesy in the premises described in the complaint, as the husband of Mary Hubbell, deceased, and that whatever estate, if any, the plaintiff has therein is as remainder-man. The reply puts in issue the affirmative allegations of the answer, and, for a further and separate defense thereto, alleges that the defendant was plaintiff's tenant, but, having failed to pay rent, the plaintiff, more than ten days previous to the commencement of the action, served upon him a written demand for possession of the premises; that plaintiff purchased the property in controversy at administratrix's sale made under an order of the County Court of Multnomah County in the matter of the estate of Mary Hubbell, deceased; that, while the property was being offered for sale at public auction, the defendant willfully stood by and represented to the plaintiff that he could safely buy the property, and, to induce him to bid thereon, represented that he had no interest of any kind therein, and that whoever purchased it would get a title in fee thereto free from all incumbrances; that the plaintiff, believing such representations and relying thereon, was induced to, and did, purchase the property at such sale for the sum of \$630. The trial of the cause in the justice's court resulted in a judgment in favor of the plaintiff, from which defendant appealed to the circuit court, where a jury trial was had, without

objection, and a verdict returned in favor of the plaintiff. The defendant thereupon moved for judgment notwithstanding the verdict, upon the ground, among others, that the plea of estoppel set up in the plaintiff's reply is insufficient, in that it does not allege fraud on the part of defendant Hubbell, or facts from which fraud could be inferred, nor does it allege that he had knowledge of his title at the time he made the declaration in reference thereto. This motion was allowed, and a judgment entered in favor of the defendant, adjudging that he is the owner of a life estate in the premises described in the complaint, and plaintiff appeals to this court.

2. The only question discussed in defendant's brief, or to which we shall allude, relates to the sufficiency of the plea of estoppel set up in the reply. The point of the objection is that it is not alleged that the representations of the defendant were made with a fraudulent intent, or that he was apprised of the true state of his own title at the time he made them.

It is difficult to ascertain from the adjudged cases how far positive fraud must enter into the acts or declarations of the party sought to be estopped from asserting title to real estate. The authorities are practically agreed that fraud is an essential ingredient of such an estoppel, but disagree as to whether it must be in the positive intent of the party sought to be estopped, or may be inferred from the effect of the evidence he is attempting to set up. The cases upon the subject are numerous and not easily reconciled. They will be found referred to and commented upon in 3 Washburn, Real Prop. (5 ed.) 87; 2 Pomeroy, Eq. Jur. (2 ed.) §§ 807, 808. There seems, also, to be a distinction in this regard between estoppels implied from mere silence and from positive acts. In an early case (1830), Mr. Chief Justice GIBSON stated the rule to be that silence will postpone only where it was a

fraud, and hence the fraudulent concealment of title would not be imputed to one who was ignorant that he had any title to conceal. But positive acts, for the consequences of which the doer is civilly liable without regard to the question of ignorance or knowledge, stand on a different ground. For these his title may be postponed, even without actual fraud, in accordance with an equitable principle of universal application that, where a loss must necessarily fall on one of two innocent persons, it shall be borne by him whose acts occasioned it: *Robinson v. Justice*, 2 Pen. & W. 19. This rule seems to have been followed in many instances (11 Am. & Eng. Enc. Law [2 ed.], 434; 2 Washburn, Real Prop. [5 ed.] 89; 2 Dembitz, Land Tit. § 138; *Chapman v. Chapman*, 59 Pa. St. 214; *Martin v. Maine Cent. R. R. Co.* 83 Me. 100, 21 Atl. 740; *Trenton Banking Co. v. Duncan*, 86 N. Y. 221; *Trustees v. Smith*, 118 N. Y. 634, 23 N. E. 1002, 7 L. R. A. 755; *Beardsley v. Foot*, 14 Ohio St. 414, 84 Am. Dec. 405; *Cady v. Owen*, 34 Vt. 598; *Moore v. Brownfield*, 10 Wash. 439, 39 Pac. 113; *Rice v. Bunce*, 49 Mo. 231, 8 Am. Dec. 129), although there are well-considered cases holding the contrary doctrine (2 Pomeroy, Eq. Jur. [2 ed.] § 821; *Boggs v. Merced Mining Co.* 14 Cal. 279, 367; *Davis v. Davis*, 26 Cal. 23, 38, 85 Am. Dec. 157; *Brant v. Virginia Coal & Iron Co.* 93 U. S. 326, 23 L. Ed. 927).

It is not necessary at this time, however, to examine the decisions upon the subject in detail, or to indicate a preference for one view or the other. Whatever the rule may be, the doctrine seems well supported that if a party, with full knowledge of all the facts, voluntarily represents to another, who is about to purchase real estate, that he has no interest therein, intending such representation to be, and it is, acted upon, he cannot afterwards assert title in himself as against the purchaser, although

he may have been ignorant, as a matter of law, of his legal rights when he made the representation, and may have intended no positive fraud. In such case, fraud will be inferred. Knowledge of the true state of the title is necessarily imputed from knowledge of the facts, and, whether intended or not, the subsequent assertion of title would operate as a fraud upon the purchaser in the same manner as if the representation had been made with fraudulent purpose in the first instance. As a general rule, relief is never granted upon the ground of a mistake of law. In *Storrs v. Barker*, 6 Johns. Ch. *166 (10 Am. Dec. 316), a suit to enjoin the further prosecution of an action of ejectment, a wife devised her property to her husband, with the approbation and consent of the defendant, her father. The husband subsequently sold and conveyed the land to the plaintiff, who had been advised by the father to purchase, and was assured by him that he did not claim the land by inheritance, for his daughter had made a will. Mr. Chancellor KENT said that, if the case rested upon these facts alone, "it would fall within the rule of equity that where one having title acquiesces knowingly and freely in the disposition of his property, for a valuable consideration, by a person pretending to title, and having color of title, he shall be bound by that disposition of the property, and especially if he encouraged the parties to deal with each other in such sale and purchase. * * * But in this case the defendant endeavors to withdraw himself from the operation of the rule by the averment that he mistook the law of the land and did not know that the devise of a *feme covert* was void, or that his title was good as heir to his daughter until late in the year 1816. I am induced, from the proofs in the case, to believe in the truth of the averment, and the question then arises whether that ignorance of his own title will prevent the application of

the doctrine. The presumption is that every person is acquainted with his own rights, provided he has had reasonable opportunity to know them, and nothing can be more liable to abuse than to permit a person to reclaim his property in opposition to all the equitable circumstances which have been stated, upon the mere pretense that he was at the time ignorant of his title. Such an assertion is easily made, and difficult to contradict. It is rarely that a mistake in point of law, with full knowledge of all the facts, can afford ground for relief, or be considered as a sufficient indemnity against the injurious consequences of deception practiced upon mankind; and if the person, as in this case, is not merely silent and passive, but gives explicit confirmation to the title of the party in possession, and encourages him to sell, and encourages the purchaser to buy, the case is greatly altered, and equity and policy equally dictate that he, and not the purchaser, ought to suffer. His ignorance of the law ought not to protect him from the operation of the rule of equity. He could easily have dispelled that ignorance, for he had the fact of the will of his daughter before his eyes; and, if he may be allowed to plead his voluntary ignorance in destruction of equitable rights growing out of his own acts and assertions, the grossest imposition and the greatest fraud might be practiced with impunity."

So, also, in *Favill v. Roberts*, 50 N. Y. 222, the executor of a will, with the knowledge and acquiescence of the heirs, applied to the court for authority to sell and convey real estate, and subsequently sold it to a party who had been assured by the heirs that he had authority to make such sale. The heirs afterwards set up title to the property on the ground that the will did not confer upon the executor the power to dispose of the real estate, and the court, making the order for the sale, had no jurisdic-

tion of the subject-matter. But they were held to be estopped by their conduct, the court saying: "The plaintiff made the purchase and parted with his money in good faith. If the appellants knew that the order was invalid, they were guilty of a gross fraud, which would be successful unless they are estopped from disputing the assurances given by them upon which the plaintiff acted in making the purchase and parting with his money. Under these circumstances, they are estopped. * * * But suppose, what is more probable, that they were ignorant of the invalidity of the order of the court, and really believed that it conferred power upon Lewis to sell and convey their interest in the land, this will not aid the appellants. We have already seen that the plaintiff had the right to assume that they were acquainted with their own title, and with the extent of the authority of Lewis to dispose of their interest in the land, and to act upon such assumption." Again, in *Maple v. Kussart*, 53 Pa. St. 340 (91 Am. Dec. 214), a husband and wife were tenants by entirety, and, after the husband's death, the land so held was sold, and the widow, who, ignorant of her rights as survivor, had in good faith encouraged a purchaser to bid for and take a deed to it, was held estopped to set up a claim thereto. In *Longworth v. Aslin*, 106 Mo. 155 (17 S. W. 294), it was decided (quoting from the syllabus) that, "where one advises and encourages another to buy an adverse title to land, he will be estopped to deny the vendee's title, even though he was acting under a mistake of law as to the validity of his own title." So, also, in *Hill v. Epley*, 31 Pa. St. 331, it is said that, "if a person positively encourages another to purchase either land or a chattel, he cannot afterwards assert any title in himself to the thing purchased, and this though he may have been ignorant of his rights when he gave the encouragement; for though, in the latter case, there

may have been no fraudulent intent, yet the assertion of his title would operate as a fraud, as much so as if there had been a fraudulent purpose. Besides, the equitable principle is that, when a loss must befall one of two innocent persons, that one must bear it through whose act it was occasioned."

These authorities are decisive of the case under consideration. At the time the defendant made the representations alleged he knew, or was chargeable with knowledge, of his estate in the land then being offered for sale. When he informed the plaintiff, an intending purchaser, that he had no interest therein, but that it belonged to the estate, and whoever purchased would get a title in fee, and the plaintiff acted upon such representations, and made the purchase, he estopped himself from thereafter denying the plaintiff's title, although he may have been ignorant, as a matter of law, of his own title, and may have intended no positive fraud. *House v. Fowle*, 22 Or. 303 (29 Pac. 890), is distinguishable from the case at bar in that the widow, who was sought to be estopped from asserting a claim of dower against a purchaser at an administrator's sale, did not represent to him that she had no claim or interest in the land.

As the case comes here on a motion for a judgment notwithstanding the verdict, we have no concern with the facts, and must assume that the allegations of the reply were supported by the testimony. And, since the pleading is sufficient, the judgment of the court below must be reversed and the cause remanded, with instructions to overrule the motion, and for such further proceedings as may be right and proper. REVERSED.

Argued 9 October; decided 22 October, 1900.

MARKS v. COATS.

37 609
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[62 Pac. 438.]

REMOVAL OF ADMINISTRATOR—CONFLICT OF INTEREST AND DUTY.

In view of Hill's Ann. Laws, § 1167, providing that when the estate of a decedent is insolvent, and deceased has made in his lifetime a conveyance of property which is void as against creditors, it is the duty of the administrator to petition the county court for leave to sue to set such conveyance aside, an administrator of an insolvent estate who is one of the grantees in a series of deeds claimed by creditors to be void for lack of consideration should be removed without regard to the question whether the conveyances are void, since one whose personal interests are in conflict with his duty as administrator is not a proper person to hold the office: *Re Mills' Estate*, 22 Or. 210, followed.

From Douglas: HIERO K. HANNA, Judge.

Petition by Asher Marks, as administrator, against W. H. Coats, as administrator of the estate of Thomas Coats, deceased, for the removal of defendant as administrator. From a decree of the circuit court affirming a decree of the county court in favor of petitioner, defendant appeals.

AFFIRMED.

For appellant there was a brief over the name of *Willis & Rice*, with an oral argument by *Mr. Dexter Rice*.

For respondent there was a brief and an oral argument by *Mr. J. C. Fullerton*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

On December 10, 1895, Thomas Coats died in Douglas County, and his son, the appellant, was appointed administrator of his estate. At the time of his death he was seised and possessed of real and personal property, which was inventoried by the administrator and appraised at \$814.38, and was indebted about \$2,400, including the sum of \$954, and some interest, due petitioner's intestate on a promissory note of date January 4, 1892. In Janu-

ary, 1895, a few months before his death, and while so indebted, he conveyed to his son three hundred and twenty acres of land, valued at from \$1,000 to \$1,600, and to his daughter, Mrs. Wells, one hundred and sixty acres, of the probable value of \$500. Neither of these two tracts of land was included in the inventory filed. On May 22, 1897, the petitioner applied to the county court for the removal of the administrator, alleging that the conveyances to him and Mrs. Wells from the deceased were made and accepted with intent to hinder, delay, and defraud creditors; that he had fraudulently failed to include such property in the inventory, and was thereby unfaithful to his trust, to the loss of the petitioner. The administrator filed an answer to the petition, in which he admits that he did not inventory the property conveyed to him and his sister, but denies the fraud set out in the petition, and alleges that such property was purchased by them in good faith and for a valuable consideration, and was not included in the inventory, for the reason that no part of it belonged to the estate. Upon a hearing before the county court an order was made removing the administrator, which was affirmed by the circuit court, and hence this appeal.

The statute (Hill's Ann. Laws, § 1112), requires an executor or administrator, within a month from the time of his appointment, or such further time as the court or judge may allow, to make and file an inventory, verified by his own oath, of all the real and personal property of deceased which shall come to his possession or knowledge, and for a willful failure in this respect he may be removed: *In re Holladay's Estate*, 18 Or. 168 (22 Pac. 750). In making such inventory, it is his duty to include property which he knows to have been fraudulently conveyed by his intestate: 2 Woerner, Law Adm. (2 ed.) *666; *Minor v. Mead*, 3 Conn. 289; *Andruss v. Doolittle*, 11

Conn. 283. And it has even been held that an administrator's refusal to inventory property alleged to have been fraudulently conveyed, when requested by a creditor of an insolvent estate, is sufficient ground for his removal without proof that the conveyance was, in fact, fraudulent: *Andrews v. Tucker*, 7 Pick. 250. But whether the authorities generally go to that extent or not is immaterial at this time. The statute provides (Hill's Ann. Laws, § 1167), that, whenever the assets of the estate are insufficient to satisfy the funeral charges, expenses of administration, and the claims against the estate, and the deceased shall in his lifetime have made or suffered any conveyance or sale of real or personal property, with intent to delay, hinder, or defraud creditors, or when such conveyance or sale has been so made or suffered that the same is void as against creditors, it is the duty of the administrator or executor to make application by petition to the county court for leave to commence and prosecute to final judgment or decree the necessary and proper action, suit, or proceeding to have such conveyance declared void. Under this section we conceive the law to be that, where the estate of the deceased is insolvent, and it appears that he made a conveyance of land in his lifetime, which there is reasonable ground to believe fraudulent, the creditors have a right to insist that the administrator shall proceed as directed by the statute; and if he refuses to do so, or if his personal interests are such as to prevent him from doing his official duty in this regard, he is not a suitable person to be intrusted with the duties of the office, and should be removed: *In re Mills' Estate*, 22 Or. 210 (29 Pac. 443); *Putney v. Fletcher*, 148 Mass. 247 (19 N. E. 370); *Kellberg's Appeal*, 86 Pa. St. 129. We do not deem this a proper proceeding in which to try the question as to whether the conveyances from Thomas Coats to his

children were in fact void as to creditors. It is sufficient, for the purposes of this case, that there is reasonable ground to believe them void, and that the respective interests of the appellant and creditors are so adverse that he cannot fairly represent both in a suit to determine the validity of such conveyances. No consideration whatever passed between Thomas Coats and Mrs. Wells for the conveyance to her. The land was subject at the time to a mortgage of \$250, which the evidence tends to show she agreed to pay, but subsequently neglected to do so, concluding the land to be worth less than the mortgage. The only alleged consideration for the conveyance to appellant was the labor and services which he had rendered, and was thereafter to render, for his father. No money whatever was paid, and the testimony in reference to the value and extent of his services, and to the contract under which he performed them, is so indefinite and uncertain as to make it quite doubtful whether the conveyance was not a voluntary one, and therefore constructively fraudulent and void as to existing creditors. It is unnecessary to further comment upon the testimony, or to express an opinion upon the merits of the controversy. It is obvious that the creditors' interests demand that appellant be removed, and some disinterested person appointed administrator, who can, if so advised, proceed under section 1167 to determine the question. It follows that the decree of the court below must be affirmed, and it is so ordered.

AFFIRMED.

Decided 19 November, 1900.

BARRETT v. SCHLEICH.

[82 Pac. 792.]

SPECIFIC PERFORMANCE OF PAROL CONTRACT—ORDER OF PROOF.

1. Under Hill's Ann. Laws, § 830, declaring that the order of proof shall be in the discretion of the court, in a suit for the specific performance of a parol contract to convey land, executed on complainant's part, the admission of evidence of the agreement before proof of complainant's performance was not error.

SPECIFIC PERFORMANCE—ALLEGATION OF PART PERFORMANCE.

2. In a suit for specific performance of a contract to convey land, a complaint alleging that defendant agreed with complainant that if she would put improvements on a part of his farm and reside there, he would convey such portion to her, and that in pursuance of such agreement she caused improvements to be made on the portion surrendered, is sufficient after decree, as it may then fairly be inferred that she went into possession under the agreement.

CONTRACT TO CONVEY—PART PERFORMANCE.

3. The amount of performance necessary to justify the enforcement of an oral contract to convey land must depend upon the condition and ability of the party claiming a specific enforcement, and in this case the part performance was sufficient.

CONSTRUCTION OF CONTRACT TO CONVEY.

4. Where the complaint in a suit for the specific performance of an oral contract to convey land alleged that complainant, in consideration of defendant's agreement to convey, agreed to reside on the land, to build a house and fences, and to cultivate the land, and no motion was made in the trial court to require the complainant to specify more definitely as to the term of residence and the character and extent of the improvements required by the agreement, failure to require such specific allegations authorized the court to construe the character of the improvements and the length of time as qualified by the word "reasonable," and, the evidence showing a reasonable compliance, a decree for complainant will not be disturbed.

From Washington: THOS. A. MCBRIDE, Judge.

This is a suit by Mary Ann Barrett against John Schleich and others to enforce the specific performance of a parol agreement to convey real property. It is substantially alleged in the complaint that Peter Barrett is

NOTE.—See monograph in 68 Am. St. Rep. 753 on When Specific Performance of a Contract will not be Decreed Owing to the Court's Inability to Enforce its Decree.

As to Specific Performance of Contracts Regarding Personal Property, see 70 Am. St. Rep. p. 643; 12 L. R. A. 776.

For a collection of cases in which defendant was unable to specifically perform, see 16 L. R. A. 614.

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plaintiff's husband; that the defendants John and Johanna Schleich are husband and wife, and the parents of the defendants Edward J. and Catherine Schleich, and that plaintiff is a daughter of Johanna and a stepdaughter of John Schleich; that on April 10, 1893, said John Schleich, being the owner and in possession of a farm in Washington County, Oregon (particularly describing it), containing one hundred acres, more or less, entered into an agreement with the plaintiff whereby it was stipulated that if she and her husband, who were then living in Portland, Oregon, would reside upon said farm, he would convey to her, by a good and sufficient deed, twenty acres thereof, to be thereafter selected and surveyed, upon the further consideration that she and her husband should build a house and fences upon and improve and cultivate said tract, in pursuance of which agreement they on or about that date moved upon said farm, and have ever since resided thereon; that about September 1, 1894, it having been agreed by the parties that said twenty-acre tract should be definitely selected and conveyed, the plaintiff caused it to be surveyed, and the boundaries thereof, which are particularly stated, were agreed to by said John Schleich, who on October 1, 1894, surrendered the possession of the premises so surveyed to the plaintiff, who ever since has resided on and been in possession thereof; that pursuant to said agreement plaintiff caused a part of said twenty-acre tract to be cleared, erected a house and a barn and built a fence thereon, and made other improvements at a cost to her of \$450; that John Schleich, though often requested, has refused to execute to plaintiff a deed of said tract, and on November 20, 1896, with intent to defraud her, and without any consideration therefor, he and his wife executed to their said children a deed for said farm, including said twenty-acre tract, which deed has been duly recorded in said county; that said

Edward J. and Catherine Schleich, at the time their deed was executed, knew that their father had agreed to convey said tract to plaintiff, that it had been surveyed and the boundaries thereof established, and that plaintiff was in possession of the premises and had made the improvements thereon, notwithstanding which they claim to be the owners thereof. The defendants, having denied the material averments of the complaint, allege, in effect, that about April 10, 1893, the plaintiff and her husband, without any agreement in relation thereto, moved upon the farm of John Schleich, who, by reason of their relationship, permitted them to reside thereon; that, plaintiff's husband having expressed a desire to improve said land by erecting a house thereon in which his family could live separate from that of John Schleich, the latter advanced to him the sum of \$150 for that purpose, whereupon plaintiff and her husband erected a small house and stable, the cost of which did not exceed \$10, cleared a part of the land at a cost of not more than \$24, and built a temporary fence, which is of no value; that ever since the plaintiff and her husband moved upon said premises John Schleich has plowed and cultivated the same, permitted them to take the crops grown thereon, and has furnished a portion of the food eaten and of the clothing worn by the plaintiff and her family; and that her possession of the land is a cloud upon the title thereto, which they pray may be removed. The reply having put in issue the allegations of new matter in the answer, a trial was had, resulting in a decree as prayed for by plaintiff, and defendants appeal.

AFFIRMED.

For appellants there was a brief over the names of *Samuel B. Huston*, and *Cake & Cake*, with an oral argument by *Mr. Huston*.

For respondent there was a brief over the names of *A. D. Miller, Robert F. Bell* and *John W. Whalley*, with an oral argument by *Mr. Bell*.

MR. JUSTICE MOORE, after stating the facts, delivered the opinion of the court.

1. It is insisted by defendant's counsel that the court erred in admitting, over their objection and exception, testimony tending to prove the alleged parol contract, before any evidence was offered of the part performance thereof relied upon by the plaintiff to take the case out of the statute of frauds. The point contended for is maintained by Mr. Pomeroy in his valuable work on Contracts (section 107), where, in commenting upon the manner of proving the acts of part performance and the terms of the oral agreement in the order stated, the learned author says: "And this is not a mere question of the order of proofs. It involves the very principle of the jurisdiction." Our statute, as far as applicable herein, provides that no estate in real property can be transferred otherwise than by a conveyance or other instrument in writing, subscribed by the party transferring the same, and executed with such formalities as are required by law: Hill's Ann. Laws, § 781. Evidence, therefore, of an oral agreement to convey real property, is ineffectual to transfer any estate therein. Where, however, the owner of real property has permitted a purchaser thereof, under a parol contract, to treat the agreement as binding, and, acting upon the faith thereof, to take possession of the premises, and to perform in part the terms to which the parties assented, a court of equity, in a suit instituted for that purpose, can, notwithstanding the statute of frauds, specifically enforce the agreement in respect to its terms and subject-matter as if it were in writing, if it satisfactorily appears that the agreement sought to be enforced is fair

and just, mutual in its character, and certain in its terms : *Odell v. Morin*, 5 Or. 96 ; *Whiteaker v. Vanschoiack*, 5 Or. 113 ; *Brown v. Lord*, 7 Or. 302 ; *Wagonblast v. Whitney*, 12 Or. 83 (6 Pac. 399) ; *Cooper v. Thomason*, 30 Or. 161 (45 Pac. 296). The parol agreement to convey real property is the foundation, and the part performance thereof by the purchaser is the superstructure, which, considered as a unity, authorizes a court of equity specifically to enforce the contract ; and it seems to us that, under our statute respecting the order of proof, it is discretionary with the court as to which of the two important facts shall be first proven : Hill's Ann. Laws, § 830. It is argued by defendant's counsel that the right of the court to regulate the order of proof relates to the reception of competent evidence only, and not to a right to admit incompetent testimony. If it be conceded that the point insisted upon be true, the legal principle thus involved can have no application to the case at bar ; for it is admitted that evidence of the oral agreement would be admissible after proof of the acts of part performance had been made.

2. It is insisted that the complaint does not allege that the plaintiff went into possession of the twenty-acre tract in pursuance of the oral agreement, and hence it does not state facts sufficient to constitute a cause of suit. It alleges that in pursuance of the agreement she moved upon Schleich's farm ; that, the land which he promised to give her having been surveyed, he surrendered to her the possession thereof, and that in pursuance of said agreement she caused a part thereof to be cleared, and erected a house and a barn and built a fence thereon ; but she does not aver in positive terms that she took possession of said land under the agreement. When no relation of affinity or consanguinity exists between the vendor and vendee, possession of land under a parol agreement, with the consent of the vendor, is a suffi-

cient part performance to take the case out of the statute of frauds, even without the payment of a consideration or the making of improvements: Pomeroy, Spec. Perf. § 115. But, where the parties are related, possession alone is insufficient for that purpose, and the making of valuable improvements by the donee in possession is essential to establish his right to enforce the specific performance of a parol gift of land: Pomeroy, Spec. Perf. § 130. The reason for this distinction undoubtedly is that the owner of real property owes no duty to a stranger, who, having secured possession of land with his consent, the occupancy thereof raises a presumption that the parties have entered into some agreement respecting an estate in the premises. When, however, the owner permits a person to whom he owes a duty to take possession of his real property, the relation existing between them creates a presumption that the possession is in pursuance of some license, and not in consequence of any agreement to convey the premises. In the case of a stranger, the possession of real property with the owner's consent being regarded as a sufficient part performance to take the case out of the statute, it is necessary to allege in the complaint and to prove at the trial that such possession was taken and held under or in pursuance of the parol agreement relied upon. In the case of a person to whom the owner owes a duty, valuable and permanent improvements made to or placed upon the premises with the owner's consent are necessary to take the case out of the statute; and, as no improvements can be made except by a party in possession, it would seem necessary only to allege and prove that the improvements were made in pursuance of the parol agreement to convey the premises. Mr. Pomeroy, in his work on Contracts (section 124), in elucidating the principle that possession must be in pursuance of the contract, and with a view to carry

it into execution, says: "This rule has its most frequent application to cases in which the possession is not a new fact, but is the uninterrupted continuation of a former condition. It results as a necessary corollary from the rule itself that such a possession (one, that is, which merely prolongs a pre-existing situation of the party in reference to the land) can not alone be a part performance of an intervening contract, since it will be accounted for by the prior condition as naturally as by the new agreement." The plaintiff having alleged that Schleich surrendered to her the possession of the land after it was surveyed, which was subsequent to the making of the parol contract, and that in pursuance of such agreement she made the improvements upon the premises, we think it fairly inferable from the complaint that her moving to and residing upon his farm, the survey of the land, her possession thereof, and the improvements made thereto, were all under and in pursuance of the parol agreement. No demurrer to the complaint was interposed, and the cause having been tried upon the theory that plaintiff alleged a continuous performance of a series of acts in pursuance of the oral agreement, and notwithstanding the complaint may be defective in the particulars specified, we think it is sufficient to support the decree.

3. It is contended that the improvements made upon the premises are too slight and temporary to raise an equity in behalf of the donee to have the gift enforced. The evidence shows that the house and barn are not very valuable, but they protect the plaintiff and her family from the inclemency of the weather, affording them a home and a shelter for their stock. They have cleared the timber and brush and grubbed up the stumps and roots from about ten acres of the land in question, and have made all the improvements which their very limited

means would permit; and because they are poor is no reason why a court of equity should deny the relief to which they are entitled.

4. It is insisted that, in order to give a decree for plaintiff, it will be necessary to ignore the allegations of the complaint, to disregard the testimony introduced by the plaintiff, and to find that the defendants agreed to give the deed for the land on or before March 25, 1897—the date when the suit was instituted. It is alleged in the complaint, in substance, that the plaintiff and her husband, in consideration of Schleich's agreement to convey to her the twenty acres of land, agreed to reside upon his farm, to build a house and fences upon the land which they were to receive, and to improve and cultivate the same. It will be observed that the length of the term in which the plaintiff and her husband were required to reside upon Schleich's farm is not stated, that the kind of a house and fences is not specified, and that the character of the improvements to be placed upon, and the extent of the cultivation of, said land are not designated. No motion was made in the court below to require the plaintiff to specify with greater particularity the terms of the oral agreement to be kept and performed by her. While it is true that a contract for the sale of land of which a court of equity is justified in decreeing a specific performance must be certain and defined (*Odell v. Morin*, 5 Or. 96), the failure to require more specific allegations of the facts concerning the terms of the oral agreement waived the objections now urged, and authorized the term of residence, the kind of house and fences, and the character and extent of the improvements to be construed as being qualified by the word "reasonable;" and, this being so, the evidence, to our minds, conclusively shows that the plaintiff at the time the suit was instituted had fully complied with the terms of her agree-

ment, and was entitled to a deed of the premises. It is unnecessary to quote from or to comment upon the testimony, which we think conclusively shows that Schleich entered into the parol agreement relied upon; and this conclusion is reached without considering the statements imputed to Mrs. Schleich, as the agent of her husband, in the absence of any testimony tending to establish such agency. The testimony also shows that Schleich, without the knowledge of his children, voluntarily conveyed his farm to them; and, the evidence being of the character and degree required to support the decree, it is affirmed.

AFFIRMED.

Argued 9 October; decided 29 October, 1900.

WOLLENBERG v. MINARD.

[62 Pac. 532.]

CONSTRUCTION OF PLEADINGS—EQUITY JURISDICTION.

1. Under the general rule that pleadings should be liberally construed to the accomplishment of substantial justice, *held*, that the complaint in this case was based on the theory that the land in question had been mortgaged by an instrument in the form of a deed, and that the suit was to determine that question, which is a proper subject of equity.

EQUITY—TRIAL ON APPEAL—REFEREE'S REPORT.*

2. Equity suits are tried *de novo* on appeal, and the report of a referee is not binding on the supreme court.

From Douglas: J. W. HAMILTON, Judge.

Suit by H. Wollenberg, administrator *de bonis non* of the partnership property of S. Marks & Co. against R. L. Minard and another. From a decree in favor of plaintiff, defendants appeal.

MODIFIED.

For appellants there was a brief over the name of *Willis & Rice*, with an oral argument by *Mr. Dexter Rice*.

*NOTE.—On the question, How far a referee's report is conclusive, see *Nessley v. Ladd*, 29 Or. 354.

For respondent there was a brief and an oral argument by *Mr. J. C. Fullerton*.

MR. JUSTICE MOORE delivered the opinion.

This is a suit to subject certain real property to the payment of a judgment. The facts are that on January 14, 1885, the defendant R. L. Minard, for a valuable consideration, executed to Samuel Marks and Asher Marks, partners as S. Marks & Co., his promissory note, payable one day after that date. Samuel Marks having subsequently died, Asher Marks was appointed administrator of the partnership estate, and duly qualified as such. The father of said defendant died testate April 21, 1896, leaving him certain real property in Douglas County, Oregon; and on April 23, 1896, for the expressed consideration of \$1,500, said defendant executed to the defendant A. T. Thompson a warranty deed of all his interest in said real property, which deed was on the next day duly recorded. An action having been instituted by said administrator in a justice's court of said county against Minard on his said note, judgment was rendered therein April 7, 1898, for \$105, an attorney's fee of \$25, and \$2.00 disbursements; and six days thereafter the administrator filed with the county clerk of said county a transcript of said judgment, which was immediately docketed in the judgment docket of the circuit court for said county. In this suit the complaint alleges, in substance, that the deed executed by Minard to Thompson was intended by them as a mortgage to secure the sum of \$500, and to place the property beyond the reach of Minard's creditors, and with intent to hinder, delay, and defraud the plaintiff. The court having denied a motion to strike out the complaint on the ground that several causes of suit therein were not separately stated, and overruled a demurrer predicated on the same ground,

and because the plaintiff had an adequate remedy at law, and that the complaint did not state facts sufficient to constitute a cause of suit, an answer was filed, denying the material allegations of the complaint, and averring that Thompson purchased said property with intent to secure the absolute title thereto in fee simple, paying therefor a valuable consideration, and that he had no knowledge of Minard's indebtedness to the plaintiff or to any other creditors. A reply having put in issue the allegation of new matter in the answer, the cause was referred to Ira B. Riddle, who found from the testimony taken that Thompson was an innocent purchaser of said real property for a valuable consideration and without knowledge of Minard's indebtedness. The court, however, upon plaintiff's exceptions thereto, set aside such findings, and found that Minard executed the deed without any consideration therefor, and with intent to cheat and defraud his creditors, he having no other property with which to pay his indebtedness, and decreed that the deed be set aside, and the property sold upon execution to satisfy plaintiff's judgment, from which decree defendants appeal. Asher Marks having died after the appeal was perfected, H. Wollenberg, upon the suggestion of his death, was by order of this court substituted as plaintiff.

1. The allegation that Minard is the owner of said real property, and that plaintiff had secured a judgment against him, which had become a lien thereon, would seem to indicate that the plaintiff had an adequate remedy at law; but the complaint is undoubtedly based upon the theory that the deed was intended by the parties thereto as a security for the payment of a debt, and hence Minard, notwithstanding the conveyance, must be deemed the legal owner of the property, which might be sold upon an execution issued on the judgment, but, by

reason of the inadequacy of the price it would be likely to bring in consequence of the apparent condition of the title thereto, this suit was instituted to clear away the incumbrance: 5 Enc. Pl. & Prac. 392. The complaint also contains the following averment: "Plaintiff further alleges that the legal title to said real property was by the defendant Minard placed in the name of the defendant Thompson for the purpose of putting the said property beyond the reach of the creditors of the said defendant Minard." It will thus be seen that the complaint is inconsistent, in stating that Minard is the owner of, and that Thompson holds the legal title to, said real property; but, construing the allegations of the pleading liberally, for the purpose of determining its effect, with a view to substantial justice between the parties (Hill's Ann. Laws, § 84), we are satisfied that the complaint is predicated upon the assumption that the deed was intended by the parties thereto as a mortgage to secure the sum of \$500, and no error was committed in overruling the demurrer.

2. It is insisted that the referee, having seen the witnesses and heard them testify, was better able to determine their credibility and the weight of their testimony than the trial court could from an inspection of the transcript, and that, the referee having found for the defendants, the court erred in setting aside his findings. That the referee enjoyed superior advantages in the respects claimed must be admitted (*Lovejoy v. Chapman*, 23 Or. 571 32 Pac. 687; *Bruce v. Phoenix Ins. Co.* 24 Or. 486 34 Pac. 16); but, appeals in equity being tried in this court anew on the transcript, neither the findings of the referee nor of the trial court are binding upon this court.

We have examined the testimony with much care, and conclude therefrom that the findings of the trial court are supported by circumstances which, in our judgment, give

preponderance to the plaintiff's evidence. It appears that Minard was indebted to Thompson in the sum of \$500 at the time he executed the deed in question, and that he was then, and has since been, employed by Thompson. The latter testifies, however, that when he secured the deed he had no knowledge of Minard's indebtedness to S. Marks & Co. and others; but, when it is remembered that the deed was executed three days after Minard secured a title to the premises by the death of his father, this fact alone is a circumstance which would seem to attract attention. Thompson further testifies that, at the time he purchased the property, Minard informed him that he might want to repurchase it, to which he replied that if he would repay the \$1,500 and interest, and the property had not been sold, he could have it. Thompson borrowed from the Douglas County Bank the sum of \$1,100 April 24, 1896, for which he gave his promissory note, with A. C. Marsters as surety. Marsters, appearing as defendant's witness, having testified in relation to the execution of the note, and the payment of some money by Thompson to Minard, was asked the following question: "You say that he paid over some money to Mr. Minard at that time,—how much, do you know?" To which he replied: "The \$1,100 that we drew from the bank there, and some money that he had in his pocket. Just the amount, I do not know." Thompson, in speaking of the sum of money borrowed to purchase the property, testified: "I made arrangements with Alvia Marsters to borrow \$1,100, and \$375 I had in the other bank, and the rest I had in my pocket. I paid him \$1,500 on the twenty-fourth of April, and turned the money over to him in the Douglas County Bank."

It will be remembered that Minard owed Thompson \$500 at the time he executed the deed, notwithstanding

which Thompson paid him the full consideration for the land; and on cross-examination Thompson said that, after paying Minard \$1,500, they settled their accounts, and Minard repaid him what he owed. It seems rather unusual that Thompson, having \$400 and Minard's debt of \$500, should have borrowed \$1,100 to purchase the property, when he needed only \$600 for that purpose; and this circumstance gives rise to the inference that the payment of the full consideration was for appearance only, in case Thompson's title should ever be assailed. Thompson exchanged some of the property he thus received with the other Minard heirs, thereby securing an undivided one half interest in a house and two lots in Roseburg, Oregon, which has been occupied by the defendant Minard, whose wife purchased from his sister the other interest therein, taking the deed in her own name. Asher Marks, as a witness in his own behalf, in speaking of a conversation he had with Thompson concerning the property in question, testified as follows: "I asked him if he had purchased the farm from him (Minard), out here in Looking Glass. 'Well,' he said, 'I will tell you the fact. I have got a deed for it.' I says, 'How much did you give for it?' He said, 'I gave him \$500.' I said, 'Was that a *bona fide* sale?' 'Well,' he says, 'Of course I got the property in my name. I have got the deed, but whenever he gives me my money back, with interest, I will give him a deed back for the land.' "

Judge J. C. Fullerton, plaintiff's attorney, testifies that before commencing this suit he, at Marks' request, saw Thompson, who told him that he let Minard have \$800 or \$900, instead of \$500, as he stated to Marks. From this testimony, and the circumstances adverted to, we think the deed was executed to secure the sum of \$500, which has not been repaid. The decree will therefore be modified, and the said premises sold subject to Thomp-

son's lien thereon, the proceeds to be applied—first, to the expenses of sale and the plaintiff's costs and disbursements in this court and the court below; second, to the satisfaction of plaintiff's said judgment; and the surplus, if any, to be paid to whoever may be found entitled thereto by the court below. MODIFIED.

Decided 30 July, 1900.

DICKINSON v. SCHALLUS.

From Multnomah: JOHN B. CLELAND, Judge.

Suit by C. T. Dickinson against Fred Schallus to restrain a threatened sale of real estate on an execution based on a judgment against plaintiff's grantor. Plaintiff appealed from the decree. DISMISSED.

Mr. Granville G. Ames, for appellant.

Messrs. Paxton, Beach & Simon, for respondent.

The parties hereto having stipulated for a dismissal of the cause, it was so ordered. No opinion. DISMISSED.

Decided 30 April, 1900.

GILCHRIST v. LARCH MOUNTAIN INVEST. CO.

From Multnomah: ARTHUR L. FRAZER, Judge.

Action by S. A. Gilchrist to recover from the Larch Mountain Investment Co. a certain sum of money. Plaintiff had judgment for want of an answer, and sold certain real property on execution, whereby his judgment was entirely satisfied. Defendant appeared in opposition to the confirmation of the sale, and appealed from the

order overruling its objections. The respondent moved to affirm the judgment because the appeal had been abandoned.

AFFIRMED.

Mr. Sol Bloom, for the motion.

Messrs. Geo. W. P. Joseph and Edw. B. Watson, contra.

The motion to affirm the judgment of the trial court was allowed. No opinion.

AFFIRMED.

FARMERS' TRUST CO. v. W. V. R. R. CO.

From Benton : J. C. FULLERTON, Judge.

This is the last expiring gasp of the holders of certificates issued by the numerous and successive receivers of the Oregon Pacific Railroad Co. which succeeded the Willamette Valley & Coast Railroad Co. and was closed out by the Farmers' Loan & Trust Co. of New York. The steamer Willamette Valley having been sold by a federal court for certain maritime claims, the surplus was paid to the receiver of the railroad company which had owned the steamer, and is the subject of the present controversy. The report of A. C. Woodcock, Esq., special referee, was confirmed by the court, whereupon W. H. Watson appealed.

DISMISSED.

Mr. Wallis Nash, for Watson, appellant.

Messrs. W. S. McFadden and Weatherford & Wyatt, for Oregon Central & Eastern Railroad Co., respondent.

Messrs. Laurence Flinn, Geo. G. Bingham, John Burnett, E. E. Wilson, Walter S. Hufford, and F. M. Johnson, for various respondents.

Pursuant to the stipulation of the parties the appeal was dismissed. No opinion.

DISMISSED.

NOBLITT v. CARLL.

From Clackamas : ARTHUR L. FRAZER, Judge.

This was an action by Noblitt Bros. against W. E. Carll to recover for certain merchandise sold to defendant and for services performed for him at his request. There was a counterclaim for professional services. Defendant appealed. DISMISSED.

Messrs. Hedges & Griffith, for appellant.

Messrs. Dimick & Eastham, for respondents.

Pursuant to the written stipulation of the parties the appeal was dismissed. No opinion. DISMISSED.

Decided 20 October, 1900.

POT JICK v. MASON.

From Multnomah : ALFRED F. SEARS, JR., Judge.

This was an action by a Chinese aggregation, composed of Pot Jick, Frank Lim, and others, under the name of Wing Wah Lung Co., to recover damages from Mason & Wittenberg for a breach of a contract. After three trials in the circuit court the defendants had judgment.

DISMISSED.

Messrs. O'Day & Tarpley and *Geo. H. Durham*, for appellants.

Messrs. Michael G. Munly and *Henry E. McGinn*, for respondents.

Pursuant to the stipulation of the parties the appeal was dismissed. No opinion. DISMISSED.

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ACTS CONSTITUTING ADVERSE POSSESSION.

4. Plaintiff's grantors had occupied the premises in controversy for fourteen years. They had the property insured as their property, and had erected buildings thereon, which could equally as well have been erected on other lots, where the title was unquestioned. Defendant claimed under a deed executed by one who owned the property prior to plaintiff's grantors. Plaintiff's grantors testified that they had expected to find a superior title to the property, but that they would not have given up the property unless a superior title was shown. *Held*, sufficient to show adverse possession by plaintiff's grantors: *Slater v. Reed*, 274.

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1. An appeal will not be dismissed because two of the defendants who suffered a decree to be entered against them by default joined with the other defendants in the notice of appeal, where their interests are adverse to those of the plaintiff, but are not adverse to the interests of their codefendants, and they will not be injured by a reversal of the decree: *Commercial Nat. Bank v. Portland*, 83.

WHO ARE ADVERSE PARTIES.

2. In an action against a city and a contractor for materials furnished the latter for a city improvement, it appeared that the contractor, to secure the debt, gave plaintiff an order upon the city for warrants upon the fund for such improvement; that a part of the claim had been paid by warrants, and that a decree was sought against the city and contractor for the balance due, and that thereafter a decree was rendered against the city, but not against the contractor, who, however, had no decree of dismissal in his favor. *Held*, that the contractor, having no decree in his favor, and hence not being an adverse party to the city, could properly join with the city in an appeal therefrom: *Commercial National Bank v. Portland*, 83.

ADVERSE PARTY—SERVING NOTICE OF APPEAL.

3. In a case where a property owner appeals from a decree foreclosing several liens of equal rank the lienors are not adverse parties, as between themselves, so that one of them can have the appeal dismissed because the appellant failed to serve the notice on another of such lienors; for, if the decree is affirmed, the lienors are unaffected, while, if the liens of the claimants who were notified shall be defeated, the unnotified lienors are better off than before the appeal—and they will not be heard to object that another claimant was not served: *Watson v. Noonday Mining Company*, 287.

UNDERTAKING ON APPEAL—EFFECT OF STIPULATION.

4. On appeal from an order dismissing with costs a motion for modification of a decree granting a divorce and alimony, defendant gave a bond to the effect to satisfy the order appealed from so far as affirmed. About the same time a stipulation was filed providing that, in consideration that plaintiff would not file any counter bond, as provided by Hill's Ann. Laws, § 540, in order that she might enforce the decree for alimony pending the appeal, the defendant would pay her a certain sum per month until the appeal was determined, to be applied *pro tanto* in payment of any alimony to which plaintiff should be entitled on the final determination of the suit. *Held*, that the stipulation did not enlarge the scope of the appeal bond, so as to render the surety liable for alimony which accrued against defendant after the appeal was perfected: *Henderson v. Henderson*, 141.

APPEAL—CERTIFICATION OF TESTIMONY BY JUDGE.

5. Under Section 815 of Hill's Ann. Laws, the only cases in which the judge need certify the testimony for the purpose of appeal are those tried before referees: *Tullmudge v. Hooper*, 508.

TIME ALLOWED FOR FILING TRANSCRIPT.

6. The expression "time allowed to file the transcript," used in Hill's Ann. Laws, § 541, subd. 2, as amended (Laws, 1899, p. 227, § 2, subd. 2), providing the time

within which a transcript must be filed in the supreme court, means the original thirty days allowed by the statute and any extension thereof that may have been granted; but each extension must be secured before the previous one has expired: *Tallmadge v. Hooper*, 508.

VERITY OF RECORD WILL BE PRESUMED.

7. On appeal it will be conclusively presumed that the transcript correctly states what actually occurred: *Lew v. Lucas*, 208.

AMENDING BILL OF EXCEPTIONS AFTER APPEAL.

8. Where the bill of exceptions as filed in the supreme court is incomplete or incorrect, the proper practice is to secure a proper amendment by the trial court, and then file it as part of the record on appeal. This is preferable to remitting the transcript for correction: *Block v. Sammons*, 600.

ERRORS MUST BE ASSIGNED.

9. To secure a consideration by the supreme court of an alleged error, the action or omission complained of must be assigned as error: *Emison v. Owyhee Ditch Company*, 577.

TERMS FOR OMITTING NECESSARY PARTIES.

10. Where a necessary party has been intentionally or carelessly omitted from a suit, the appellate court may either dismiss the case or reverse it on a penalty (such as payment of costs), so that the absent parties may be brought in: *Wheeler v. Lack*, 238.

11. Where equity is attempting to distribute a fund over which it has jurisdiction, all the persons who are known to have an interest in the fund must be brought in, and if it appears that any such person is not a party, the case should be reversed with instructions to bring him onto the record, so that the rights of all claimants may be settled in one decree: *Wheeler v. Lack*, 238.

ACCOUNTING BY RECEIVERS—RIGHT TO APPEAL.

12. A receiver may appeal from an order of the court directing him to pay over money in his hands, when such order erroneously fixes the amount in his possession, and directs him to turn over more than he has in his custody: *Merriam v. Victory Mining Company*, 321.

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13. Where a court had no power to enter an order it is void and may be appealed from: *Stiles v. McGee*, 574.

OBJECTION FIRST MADE ON APPEAL—WAIVER.

14. The objection to a complaint in an action on the bond of a public official, that leave to sue has not been granted, should be taken by motion for nonsuit as required by Section 842, Hill's Ann. Laws, otherwise it will not be considered when raised for the first time on appeal: *Multnomah County v. Kelly*, 1.

OBJECTIONS NOT MADE AT THE TRIAL.

15. The supreme court will not consider an objection to the admission of testimony when first urged on appeal; attorneys should state the point of objection when the testimony is offered: *Currey v. Butcher*, 380.

WAIVING RIGHT TO APPEAL BY ACCEPTING PAYMENT.

16. While a party cannot appeal from a judgment in his favor after receiving the benefits thereof, his right of appeal is not waived where the amount accepted would accrue to him in any event, notwithstanding the appeal, which was for the enforcement of a disputed right to money in addition to the amount accepted: *Merriam v. Victory Mining Company*, 321.

MOTION TO DISMISS—CONSIDERATION OF THE MERITS.

17. In passing on a motion to dismiss an appeal the merits of the case will not be considered: *Corder v. Speake*, 105.

SCOPE OF MOTIONS TO DISMISS OR AFFIRM.

18. A motion to dismiss an appeal or to affirm a judgment proceeds on the theory that the appellate court is without jurisdiction, or that the appellant has not complied with some rule of court, and unless one of these conditions is made to appear the motion must be overruled: *Corder v. Speake*, 105.

DISMISSING APPEAL—VOLUMINOUS RECORD.

19. A motion to dismiss on the ground that appellant had no interest in the fund to be distributed will be continued until a hearing on the merits, where the record is voluminous: *Merriam v. Victory Mining Company*, 321.

DISMISSING APPEAL—EVIDENCE DEHORS THE RECORD.

20. Evidence outside of the record will not be received in the appellate tribunal to contradict the record of the court below; though such evidence may be considered to show material occurrences after the judgment or decree appealed from: *Merriam v. Victory Mining Company*, 321.

21. Affidavits of counsel cannot be received as evidence on a motion to dismiss the appeal of one of the appellants to show that he had disposed of his interest in the subject-matter of the suit prior to the order from which he appeals: *Merriam v. Victory Mining Company*, 321.

DISMISSING APPEAL—TERMINATION OF CONTROVERSY.

22. Where conditions have so changed that a decision of the court could not be made effective, an appeal will be dismissed; thus, where a writ of mandamus to compel a grand jury to inquire into a criminal charge is refused, and afterward the grand jury is discharged, so that it becomes impossible to enforce a judgment against it, if one should be rendered by the appellate court, the appeal will be dismissed: *State ex rel. v. Grand Jury*, 542.

WITHDRAWAL OR RELEASE OF APPEAL BOND.

23. When a bond has been filed and become a part of the appeal record, the court will not undertake to release the sureties thereon or affect the rights and liabilities of the respective parties thereto on an interlocutory motion: *Watson v. Noonday Mining Company*, 287.

PRESUMPTION IN FAVOR OF RULING OF TRIAL COURT.

24. The appointment of a receiver will not be disturbed on appeal in the absence of the evidence on which the lower court proceeded: *Fleming v. Carson*, 252.

25. On appeal the appointment of a receiver and proceedings thereunder will not be disturbed on the ground that the findings of the court on final hearing did not show cause for the appointment if the appointment was justified when made: *Fleming v. Carson*, 252.

MISCONDUCT OF COUNSEL—RULING OF TRIAL COURT.

26. Error based on the misconduct of counsel in matters of argument will not be considered on appeal, unless such misconduct was objected to at the time of trial, and the court refused to restrain or correct counsel: *Boyd v. Portland Electric Company*, 587.

HARMLESS ERROR.

27. Evidence offered in support of an admitted allegation is immaterial but harmless: *Currey v. Butcher*, 380.

28. Where there is uncontradicted parol evidence, in an action against attorneys for negligence in examining a title, tending to show that plaintiff authorized her husband to employ defendants to make the examination, the admission of the record of a power of attorney from plaintiff to her husband, if error, is harmless, since, if the defendants were employed by the husband to act for the plaintiff, and did act in that capacity, they cannot defend the action on the ground that husband had no authority to employ them: *Currey v. Butcher*, 380.

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29. It is reversible error to instruct a jury on an abstract proposition of law material to the case, when there is no evidence on that point: *Emison v. Owyhee Dutch Company*, 577.

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2. A garnishee may waive service of the allegations and interrogatories necessary to determine his liability and voluntarily appear as in other cases: *Altona v. Dabney*, 334.

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1. In an independent suit brought by a husband to modify a decree fixing the amount of permanent alimony made in a divorce suit, the court has no power to direct the husband to pay the wife's counsel fees: *Corder v. Speake*, 105.

DISBARMENT OF ATTORNEY—OBSTRUCTING COURTS OF JUSTICE.

2. An attorney who has advised and assisted his client to disobey an order of court requiring her presence before the judge, after the order had been served on the client, and she had generally appeared in answer thereto, is guilty of intending to cause a failure of justice and should be disbarred: *Ex parte Miller*, 304.

PLEADING NEGLIGENCE OF ATTORNEY.

3. A complaint alleging that defendants, a firm of attorneys, contracted with plaintiff to examine the title to certain land; that they so carelessly performed their duty that they failed to discover the existence of a judgment lien against the land; that afterwards, on discovering its existence, they fraudulently concealed it from plaintiff's knowledge, but permitted her to make the purchase, relying on their previous representations; that they then bought the judgment themselves, transferring it in trust to a third party, and compelled her finally to purchase it from him; states a cause of action for negligence in performing a duty which they, as attorneys, owed to their client, rather than a cause of action for breach of the contract of employment: *Currey v. Butcher*, 380.

TO WHOM ATTORNEY IS LIABLE FOR NEGLIGENCE.

4. An attorney is liable for negligence in the performance of his profession only to his client, and if the attorney was not aware that the person who employed him was the agent of a third person, there was no privity of contract between the attorney and such person, and no liability to him by the attorney for negligence under the employment: *Currey v. Butcher*, 380.

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1. A holder of negotiable paper is not a purchaser for value where he took the paper before maturity, without notice of any infirmity, under an agreement to make future advances, but made the advances after notice of an infirmity: *Benson v. Keller*, 120.

NEGOTIABLE PAPER—BONA FIDES—NOTICE OF FRAUD.

2. A statement to a holder of negotiable paper by the maker that he had been requested by the person in whose interest the paper was executed to withhold payment, together with a statement by the attorney of the maker that the paper had been obtained by fraudulent practices, and that he intended to sue at once for the return of the paper, is sufficient notice of infirmity in the paper to cause the holder to make further advances on it to his assignor at his peril: *Benson v. Keller*, 120.

PAROL EVIDENCE TO SHOW SURETYSHIP OF MAKER.

3. In an action on a promissory note an apparent maker may show by parol evidence that he is in reality only a surety, as against a holder with notice of the facts: *Hughes v. Pratt*, 45.

PAROL EVIDENCE—BONA FIDE HOLDER.

4. It is always competent for an apparent maker of a note to show in an action on his note that the plaintiff is not a bona fide holder, and to bring out his true position and relationship to the contract: *Hughes v. Pratt*, 45.

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In ascertaining the location of a boundary monument the fact that property was laid out with reference to a certain stone, and that public improvements were made shortly after the original survey using such stone as a known point, affords a strong inference that it is the monument originally placed to mark the boundary, rather than another stone which was first claimed to be the true monument by a surveyor who ran the lines many years after the monument had been set: *Shaver v. Adams*, 282.

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1. Equity will entertain a suit to cancel plaintiff's due bills alleged to have been fraudulently procured from him by one of the defendants and transferred to other of the defendants severally, for no legal proceeding would afford plaintiff so efficient a remedy: *Benson v. Ketter*, 120.

RETURNING CONSIDERATION PAID.

2. Laws, 1893, p. 136, provides that a branch insane asylum shall be established in the eastern part of the state. In pursuance of this statute the state officers purchased land, paying full value therefor, and agreed with the grantor to erect buildings thereon for such asylum. *Held*, that the fact that the act of 1893 was held unconstitutional did not revest title in the grantor, as the state has power to hold title to real estate, and, the deed being no more than voidable, it was incumbent on such grantor to rescind, and offer to return the purchase price to the state, before seeking a cancellation of the deed: *State v. Blize*, 404.

CARRIERS.

NEGLECTENCE OF EMPLOYEE TO ALIGHTING PASSENGER.

1. Plaintiff testified that, as she approached her destination at night, on defendant's train, the train stopped, and the brakeman said to her, "I will help you out with your things now;" that she followed him to the end of the car, where he held back the door while she passed out, and started down the steps; that the brakeman passed to the other side of the platform, and stood with his side towards her; and, after the car had stopped about fifteen seconds, the train suddenly started, throwing her beneath the car. Her testimony as to the train stopping about fifteen seconds before it reached the depot, and then suddenly starting, was corroborated by four witnesses. *Held*, that the evidence of the company's negligence was sufficient to take the case to the jury: *Smilson v. Southern Pac. Co.*, 74.

INJURY TO PASSENGER—TIME TO ALIGHT.

2. Where plaintiff testified that a train stopped fifteen seconds, and started suddenly before she had time to get off, the court cannot hold, as a matter of law, that she was negligent in not alighting in that time: *Smilson v. Southern Pacific Company*, 74.

CONTRIBUTORY NEGLIGENCE—COMPETENCY OF EVIDENCE.

3. Where plaintiff was injured by stepping from a train before it reached the depot, on a dark night, at a station where she had always lived, and was familiar with the surroundings, it was not error to allow the plaintiff to testify that the brakeman said he would help her to alight, from which she supposed the train was at the station when he spoke; otherwise, the jury might have inferred that she ought to have known where it was: *Smilson v. Southern Pacific Company*, 74.

RAILROADS—TIME FOR PASSENGER TO ALIGHT.

4. An instruction that, when a passenger on a railway train arrived at his known destination, the law required the carrier to stop for a "sufficient" length of time to allow him to alight safely, was not prejudicial to defendant in not limiting the time to a "reasonable" length of time, where defendant claimed the train had not stopped when the injury occurred: *Smilson v. Southern Pacific Co.*, 74.

EVIDENCE JUSTIFYING INSTRUCTION.

5. An instruction that, if the train stopped before reaching the station, and plaintiff was led to believe from the words or acts of defendant's employee that it was a proper time for her to alight, and in attempting to do so she was thrown to the ground by the sudden jerk of the car or in any other manner and injured, defendant was guilty of negligence, was not erroneous, as not supported by the evidence, where the brakeman had testified that when the whistle sounded he went into the car where plaintiff was seated, and announced, "The next station is Springfield," which was plaintiff's destination: *Smilson v. Southern Pac. Co.*, 74.

ALLEGATIONS AND PROOFS—NEGLIGENCE OF CARRIER.

6. Under an allegation that plaintiff went out onto the steps of a railroad car which had stopped, intending to alight, but was thrown off by the sudden starting of the train, it is not objectionable to charge the jury that plaintiff could recover if the train was moving so slowly as to justify plaintiff in thinking it had stopped: *Smilson v. Southern Pacific Company*, 74.

CASES FROM THE OREGON REPORTS Applied, Approved, Cited, Distinguished, Doubted, Followed and Overruled. See OREGON REPORTS.

CERTIFICATE

Of Trial Judge to Transcript of Testimony. See APPEAL, 5.

CHARGING JURY.

Desired Instructions Should be Requested. See TRIAL, 10.

Entire Charge Must be Considered. See TRIAL, 11.

Instruction not Invading Province of Jury. See TRIAL, 12.

Inconsistent Instructions—Reversible Error. See TRIAL, 13.

Refusing Instructions Already Given. See TRIAL, 14.

CHATTEL MORTGAGES.

MORTGAGED CROPS—TITLE OF PURCHASER OF THE LAND—SEVERANCE.

A chattel mortgage on crops growing upon mortgaged land is not a constructive severance of them which will prevent their passing to a purchaser of the land on foreclosure sale made while the crops are still standing. Unless there has been an actual severance, the crops pass with the title of the soil to which they are annexed: *Jones v. Adams*, 473.

CHATTELS.

Manner and Effect of Annexation to Realty. See FIXTURES.

CLIENTS.

Actions Against Attorneys for Negligence. See ATTORNEYS, 4.

CLOUD ON TITLE.

Jurisdiction of Equity to Enjoin Threatened Sale of Realty on Void Process. See EQUITY, 3.

CODE CITATIONS. Same as Statutes of Oregon.

COLLATERAL ATTACK.

Conclusiveness and Effect of Recitals in Order. See JUDGMENTS, 2.

Questions as to Which Order is Conclusive. See JUDGMENTS, 3, 4, 5.

New Evidence as Ground of Disregarding Order. See JUDGMENTS, 6.

Suit to Impeach Judgment for Fraud. See JUDGMENTS, 7.

COMMON CARRIERS. Same as CARRIERS.

COMMON LAW.

CURTESY UNDER THE COMMON LAW.

1. To enable a husband to claim a curtesy estate under the common law it was essential that his wife have died owning an estate of inheritance in the land in question: *Quinn v. Ladd*, 281.

RIGHT OF ALIEN TO INHERIT LAND AT COMMON LAW.

2. Under the common law an alien could not acquire real property by operation of law, though he had previously declared his intention to become a citizen, and subsequently was naturalized: *Quinn v. Ladd*, 281.

COMPENSATION

For Injuries—Example of Fair Instruction. See DAMAGES, 4.

CONDITIONAL PLEADING.

Method of Objecting to Such Pleading. See PLEADING, 4.

CONSENT DECREES.

Time and Manner of Objecting to Such Orders. See JUDGMENTS, 8.

CONSTITUTIONAL LAW.

CONSTITUTIONAL LAW—EMINENT DOMAIN—HIGHWAYS.

1. Where a road sought to be laid over private property will be open, when laid, to all who may desire to use it, the laying of the road will not constitute a taking of private property for private use, forbidden by the constitution, though it may in fact accommodate but a single family: *Fanning v. Gilliland*, 389.

TAKING PRIVATE PROPERTY—VALIDITY OF ORDER OPENING HIGHWAY.

2. An order of a county court confirming the report of viewers, declaring the road in question to be a public highway, and ordering it opened on payment of the costs and assessed damages, is not void, though at the time of entering it the damages and costs had not been paid, since by its terms there was no taking of property except on condition of the payment of damages: *Fanning v. Gilliland*, 389.

VALIDITY OF ACTS DONE UNDER AN UNCONSTITUTIONAL LAW.

3. An act done in pursuance of a statute apparently legal must be considered, in a suit between the immediate parties, as having been lawfully done, though subsequently the statute is declared void: *State v. Blize*, 404.

CONSTITUTION OF OREGON.

Article I., Section 18. *Fanning v. Gilliland*, 379.

CONSTRUCTION OF STATUTES. Same as STATUTES.

CONSTRUCTIVE FRAUD. See FRAUD, 3.

CONTEMPT.

SUFFICIENCY OF AFFIDAVIT.

Under Hill's Ann. Laws, § 653, requiring the filing of an affidavit showing the facts constituting a contempt before any proceedings can be had therefor, unless the contempt was committed in view of the court, the affidavit must be positive in its statements, and is not sufficient if made on information and belief: *State ex rel. v. Conn*, 590.

CONTINUANCE.

DISCRETION—ABSENT WITNESS.

The appellate court will not reverse a case for the refusal of the trial court to grant a continuance at the trial to secure the attendance of an absent witness, where the opposite party admitted that the witness would, if present, testify as claimed, and that such testimony should be considered as actually given, both because that matter rests in the discretion of the court and because the statute gives the opposite party the right to insist on a trial under such circumstances: *Lew v. Lucas*, 286.

CONTRACTS.

HUSBAND AND WIFE—VALIDITY OF SEPARATION AGREEMENT.

1. A contract between a man and his wife concerning his property in which she has a prospective right of dower, made after one of them has been so at fault as to warrant a divorce, is not a consent by either to a divorce, is not against public policy, and does not justify an inference that the cause of divorce was brought about by mutual consent: *Ogilvie v. Ogilvie*, 171.

2. A contract by which a husband agrees to pay certain moneys to his wife for her support for a stated period, not made for the purpose of securing a separation, but in contemplation of a divorce on account of the misconduct or disability of the husband, and without fault or inducement by the wife, is not void on grounds of public policy: *Henderson v. Henderson*, 141.

CONSENT DECREE AS TO PROPERTY IS A CONTRACT.

3. A decree carrying into effect the terms of an agreement between husband and wife by which the latter is to receive a certain sum per month for her support during her life after a divorce caused by the husband's misconduct, cannot afterward be modified by the court without the consent of both parties thereto: *Henderson v. Henderson*, 141.

4. A consent decree is in the nature of a contract; the court being satisfied of the capacity of the parties to bind themselves, enters their agreement as a public record, and if it is on its face a consent order, it is absolutely conclusive on the consenting parties, and cannot be set aside or impeached except by an original bill on the ground of fraud or mutual mistake in its terms: *Stiles v. McGee*, at p. 576.

CONTRACTS IN RESTRAINT OF TRADE—EVIDENCE—DAMAGES.

5. In an action for breach of a contract not to re-engage in a business for a specified time, evidence of the quantity of goods purchased by defendant, and the sum paid therefor, on re-entering the business, being merely a basis for estimating his profit or loss, is inadmissible, since the profit accruing to or the loss sustained by defendant after re-entering the business is not an element of plaintiff's loss, nor a measure of his damages: *Dose v. Tooze*, 13.

6. In an action for breach of a contract not to re-engage in a business for a stipulated time, an instruction permitting a recovery of the difference between the price paid and the actual value of the property at the time of its purchase is erroneous, as it allows the jury to make a new contract for the parties by ascertaining the reasonable value of the property at the time of the purchase, which was not agreed on: *Dose v. Tooze*, 13.

CONDUCT NOT AMOUNTING TO A BREACH.

7. In an action for breach of a contract not to re-engage in a business for a specified time, an instruction that defendant, by loaning money to and performing service for a rival firm, breached his contract, is properly refused, as defendant could so act if he had no interest in the rival business, and such acts were only circumstances from which the jury might determine the relation existing between defendant and such rival business: *Dose v. Tooze*, 13.

BREACH OF CONTRACT—DAMAGES—WHEN ACTION MAY BE BROUGHT.

8. Where the breach of a lease is total, an action for both present and prospective damages may be maintained without waiting the expiration of the time required for the full performance of the contract: *Salzgeber v. Mickel*, 216.

CONSTRUCTION OF RAILROAD SUBSIDY CONTRACT.

9. The expression "other just cause," in a railroad subsidy contract conditioned to perform by a day certain, unless delay should ensue in procuring rights of way, collecting the subsidy, "or other just cause," means only delays caused by reason of the conduct of the promisor, or of the law, or by the act of God: *Roseburg Railway Company v. Nosler*, 299.

CONTRACT TO CONVEY—PART PERFORMANCE.

10. The amount of performance necessary to justify the enforcement of an oral contract to convey land must depend upon the condition and ability of the party claiming a specific enforcement, and in this case the part performance was sufficient: *Barrett v. Schleich*, 613.

CONSTRUCTION OF CONTRACT TO CONVEY.

11. Where the complaint in a suit for the specific performance of an oral contract to convey land alleged that complainant, in consideration of defendant's agreement to convey, agreed to reside on the land, to build a house and fences, and to cultivate the land, and no motion was made in the trial court to require the complainant to specify more definitely as to the term of residence and the

character and extent of the improvements required by the agreement, failure to require such specific allegations authorized the court to construe the character of the improvements and the length of time as qualified by the word "reasonable," and, the evidence showing a reasonable compliance, a decree for complainant will not be disturbed: *Burrell v. Schleich*, 613.

CORPORATIONS—PREFERRED CREDITORS—OBLIGATION OF CONTRACT.

12. The priority sometimes accorded unsecured claims against corporations over prior contract debts is limited strictly to railroads, and on the ground that their continued operation is a matter of public concern; but it does not apply to claims against ordinary private corporations: *Merriam v. Victory Mining Co.* 321.

EXECUTED CONTRACTS—EFFECT OF FRAUD.

13. Where a contract has been executed between competent parties, founded on a valuable consideration, and not legally objectionable or inherently wrong, it is valid and binding between the parties, regardless of fraud practised in securing its execution: *State v. Blize*, 404.

RESCISSION—RETURN OF CONSIDERATION.

14. A party to a contract cannot rescind it while retaining benefits received under it: *State v. Blize*, 404.

CONTRIBUTION.

Cosureties Cannot Bind Each Other. See PRINCIPAL AND SURETY, 1.

Payment by one Surety as a Precedent Condition to Requiring Contribution of Cosureties. See PRINCIPAL AND SURETY, 4, 5.

CORPORATIONS.

PREFERRED CREDITORS—OBLIGATION OF CONTRACT.

The priority sometimes accorded unsecured claims against corporations over prior contract debts is limited strictly to railroads, and does not apply to claims against ordinary private corporations: *Merriam v. Victory Mining Company*, 321.

COSTS.

DISSOLVING PARTNERSHIP—COSTS.

1. In a suit to dissolve a partnership the court expenses would ordinarily be chargeable against the assets, unless one partner was at fault so that he should be charged with costs as a punishment: *Fleming v. Carson*, 252.

TRANSCRIPT AS AN ITEM OF COSTS.

2. The cost of preparing the transcript for an appeal must be paid primarily by the appellant, and the respondent cannot include it in his cost bill under any circumstances: *Rader v. Barr*, 453.

INJUNCTION TO RESTRAIN COLLECTION OF ILLEGAL COSTS.

3. Equity will interfere by injunction to restrain the collection of costs irregularly taxed without complying with the requirements of the statute as to notice, where the remedy at law is not available owing to the irregular practice of the taxing party, and the collection of such costs would be a manifest wrong: *Rader v. Barr*, 453.

PRACTICE IN FILING COST BILLS IN SUPREME COURT.

4. The provision of Section 556, Hill's Ann. Laws, requiring service of cost bills when filed more than five days after the entry of the judgment or decree, regulates the practice in the supreme court as well as in the circuit courts: *Rader v. Barr*, 453.

COSURETIES.

Enforcing Contribution Between Cosureties. See PRIN. AND SURETY, 1, 3, 4.

Changing Relation of Cosureties to Each Other. See PRIN. AND SURETY, 2.

COTENANCY.

Ouster by One Cotenant Against Another. See TENANCY IN COMMON.

COUNTERCLAIM.

Trespass as a Counterclaim to Another Trespass. See PLEADING, 15, 16.

COUNTIES.

NEGLECTENCE OF COUNTIES—DEFECTIVE HIGHWAY—STATUTES.

1. Sess. Laws, 1893, p. 141, providing that parties having no knowledge of the defective condition of a highway may recover damages from the county for injuries caused thereby, merely expresses the common law, and must be interpreted by the rules there enforced as to exercising care corresponding to the danger: *Gardner v. Wasco County*, 392.

2. Under a statute providing that whenever a traveler on a county highway, without contributory negligence, and "not having been warned of the defect or danger by notice or otherwise," sustains any loss, damage or injury, he may recover damages, etc. The clause, "not having been warned of the defect or danger by notice or otherwise," refers to written or printed notice given when roads are found unsafe, and of otherwise warning travelers by means of barriers; and a knowledge of the defect is not equivalent to the warning referred to in such clause, and does not preclude recovery where the traveler used care proportionate to the danger.—*Gardner v. Wasco County*, 392.

NEGLECTENCE OF COUNTY—ICE ON HIGHWAY.

3. An icy road ran down a steep hill along a gulch, making a sharp turn out near the bottom. As plaintiff was driving down the road with a heavy load, his horses slid on the ice, but were kept on the road as far as the turn, where they were precipitated into the gulch with their load. *Held*, in an action against the county, that the question whether a negligent construction and maintenance of the road was the proximate cause of the damage should have gone to the jury: *Gardner v. Wasco County*, 392.

ILLEGAL CONTRACT TO COLLECT TAXES.

4. A contract by county commissioners providing that, in consideration of N's agreeing to assist in the collection of delinquent county taxes, the county court will order the issuance of an alias warrant for their collection, and will advertise and sell the land and mortgages described in certain delinquent tax rolls to be prepared; that the proper county officers will bid in all property sold for which there may be no other bidders; and that N may obtain the certificate for any parcel so sold by paying the amount for which it had been sold to the county, is void as interfering with the duties of the county court, in that it provides in advance for the issuance of alias warrants, and requires the county judge to bid in all property offered for sale thereunder for which there may not be other bidders: *Burness v. Multnomah County*, 460.

INTERFERENCE WITH PUBLIC OFFICERS.

5. A contract between a board of county commissioners and a private person under which the latter is to furnish corrected descriptions for parcels of realty not correctly or sufficiently described in the tax rolls, and the board is to direct the clerk to use such corrections in preparing delinquent tax rolls is void as an attempt by the board to control the action of the clerk by making him prepare false delinquent rolls and causing him to alter the public records: *Burness v. Multnomah County*, 460.

CONTRACT TO ASSIST PUBLIC OFFICERS.

6. A county court being the general financial or business agent of the county, and charged with "the care and management" of its business and funds (Hill's Ann. Laws, § 896, subd. 9), may lawfully employ assistance in collecting delinquent taxes which cannot otherwise be collected, there being no interference with the duties of the sheriff, who is the tax collector: *State ex rel. v. Hall*, 479.

COUNTY ROADS. Same as HIGHWAYS.

COURTS.

ALLOWANCE OF ATTORNEY'S FEES.

1. In an independent suit brought by a husband to modify a decree fixing the amount of permanent alimony made in a divorce suit, the court has no power to direct the husband to pay the wife's counsel fees: *Order v. Speake*, 105.

DIVORCE—POWER TO MODIFY DECREE AS TO MAINTENANCE.

2. Under Hill's Ann. Laws, § 501, subds. 3 and 5, authorizing the court upon entering a decree of divorce to award against the party at fault an appropriate amount for the maintenance of the other, and section 502, authorizing the court on motion to set aside, alter or modify so much of a divorce decree as may have provided for the maintenance of either party, a divorce is not final nor *res judicata* between the parties as to such matters: *Henderson v. Henderson*, 141.

POWER TO MODIFY SEPARATION AGREEMENT.

3. A decree carrying into effect the terms of an agreement between husband and wife by which the latter is to receive a certain sum per month for her support during her life after a divorce caused by her husband's misconduct, can not afterward be modified by the court without the consent of both parties thereto: *Henderson v. Henderson*, 141.

POWER TO ENTER NUNC PRO TUNC ORDER.

4. Where a court made an order and directed it to be entered *nunc pro tunc* as of an earlier date, there being nothing to show that it was an order made at that time which by accident had not been entered, such order was beyond the authority of the court and void: *Lombard v. Wade*, 428.

PRACTICE IN FILING COST BILLS IN SUPREME COURT.

5. The provision of Section 556, Hill's Ann. Laws, requiring service of cost bills when filed more than five days after the entry of the judgment or decree, regulates the practice in the supreme court as well as in the circuit courts: *Rader v. Barr*, 458.

POWER TO VACATE CONSENT DECREE.

6. After the expiration of the term during which it has been entered, a consent decree cannot be attacked or impeached in any manner except by an original bill: *Stiles v. McGee*, 574.

APPEAL FROM VOID ORDER.

7. Where a court had no power to enter an order it is void and may be appealed from: *Stiles v. McGee*, 574.

EQUITY—TRIAL ON APPEAL—REFEREE'S REPORT.

8. Equity suits are tried *de novo* on appeal, and the report of a referee is not binding on the supreme court: *Wollenberg v. Minard*, 621.

CRITICAL CASES. See OREGON CASES.

CROPS.

TITLE OF PURCHASER OF THE LAND—SEVERANCE.

1. A chattel mortgage on crops growing upon mortgaged land is not a constructive severance of them which will prevent their passing to a purchaser of the land on foreclosure sale made while the crops are still standing. Unless there has been an actual severance, the crops pass with the title of the soil to which they are annexed: *Jones v. Adams*, 473.

WHEN RENT IS DUE UNDER A CROP LEASE.

2. Where land is leased for a part of the crop to be raised thereon, and there is no stipulation as to the time of payment, the share is due when the crop is harvested or within a reasonable time thereafter: *Jones v. Adams*, 473.

CROSS-EXAMINATION.

Contradictory Statements out of Court—Impeachment. See WITNESSES, 3.

Contradiction of Testimony by Physical Facts. See WITNESSES, 5.

Asking Details of Facts Shown on Direct Examination. See WITNESSES, 4.

CRUELTY.

Conduct Not Constituting Cruel Treatment. See DIVORCE, 1.

CURTESY.

CURTESY UNDER THE COMMON LAW.

1. To enable a husband to claim a curtesy estate under the common law it was essential that his wife have died owning an estate of inheritance in the land in question: *Quinn v. Ladd*, 281.

2. There being but a bare right of possession under the donation law (Act of Congress, September 27, 1850,) till completion of the four years' residence and occupation, and neither the settler nor his wife having any estate of inheritance therein till then, he had, under the common law, no right of curtesy in her half, where she died during the four years; and this, though, after completion of the four years, patent issued for one-half the claim to her and her heirs: *Quinn v. Ladd*, 281.

WHEN CURTESY LAW TOOK EFFECT IN OREGON.

3. The first statute in Oregon regulating the subject of curtesy was passed on January 16, 1854, but did not go into effect until May 1, 1854 (Laws, 1855, pp. 400, 410); prior to that time the subject was regulated by the common law: *Quinn v. Ladd*, 287.

DAMAGES.

GENERAL AND SPECIAL DAMAGES—PLEADING.

1. Under an unsegregated allegation of pecuniary loss a party may recover those damages that are necessarily and inevitably sustained through the act complained of, which are designated general damages; while special damages are those which may naturally flow from the wrongful act or omission, but to be recoverable such must be specially claimed: *Dose v. Tooez*, 13; *Salzgeber v. Michel*, 216.

FUTURE MENTAL SUFFERING AS AN ELEMENT OF DAMAGES.

2. Where a person has sustained bodily injuries through the negligence of another the mental suffering that must necessarily be endured is an element of damages: *Smitsen v. Southern Pacific Company*, 74.

NECESSARY PHYSICAL SUFFERING AS AN ELEMENT OF DAMAGES.

3. Where plaintiff was injured by falling from the defendant's train, she is entitled to recover for the future bodily suffering occasioned by the loss of her limbs, such as the evidence shows it is reasonably certain she will be called on to endure: *Smitsen v. Southern Pacific Company*, 74.

COMPENSATION FOR INJURIES.

4. Where plaintiff, in falling from defendant's train, sustained an injury which necessitated the amputation of both her limbs, an instruction that, if the injury was caused through defendant's negligence, the jury should award her such sum as would compensate her for the injury, not to exceed the amount demanded, was not prejudicial to the defendant, though exact compensation may not be obtainable in such a case: *Smitsen v. Southern Pacific Company*, 74.

FAILURE OF WITNESS TO ATTEND TRIAL.

5. Under a statute providing that a witness who shall refuse or neglect to attend a trial after being subpoenaed and paid his legal fees shall pay a forfeit to the party who desired his attendance and all damages sustained, it must be shown that some injury resulted from the nonattendance: *Lombard v. Smith*, 22.

DAMS.

Mining Stream—Debris—Right to Abate as a Nuisance. See **NUISANCE**, 1.

Enjoining Dams—Injury to Complainant. See **INJUNCTION**, 4.

DECEIT.

When Action for is Not an Adequate Remedy. See **EQUITY**, 11.

DECREES. Same as JUDGMENTS.

DEEDS.

WHAT CONSTITUTES DELIVERY.

1. The delivery of a deed is consummated when the control of it passes beyond recall with the consent of the grantor: *Swank v. Swank*, 439.

PRESUMPTION OF DELIVERY FROM POSSESSION.

2. The possession of a properly executed deed by the grantee creates a disputable presumption of delivery: *Swank v. Swank*, 439.

DELIVERY OF DEED THROUGH AGENT.

3. The giving of a deed by the grantor, after signature and acknowledgment, to one employed by the grantee to prepare it and take the acknowledgment, without direction regarding its custody or disposition, constituted a sufficient delivery thereof, though not given to the grantee till after the grantor's death, since such employment by the grantee constituted the person employed his agent, and delivery to such agent was delivery to the principal: *Swank v. Swank*, 439.

EVIDENCE OF MENTAL CAPACITY.

4. Evidence that a grantor's physician on the day a deed was executed considered his mind remarkably clear for one who had suffered so long, and a clergyman who visited and talked with him frequently prior to that day and afterward until his death thought him always perfectly rational, and that such grantor's

wife signed the deed at his request while she was feeling as well as usual, in order to stop his worrying, shows mental capacity and knowledge of the transaction in hand, rendering such parties competent to execute the deed, though for over two months prior to its execution such grantor had suffered much pain, to relieve which morphine had been frequently administered, and his wife was much exhausted by watching and nursing him: *Swank v. Swank*, 439.

PRESUMPTION AS TO DATE OF DELIVERY.

5. Where the date of a deed appears in evidence but not the date of its acknowledgment, it will be presumed that it was delivered on the day of its execution: *Crossen v. Oliver*, 514.

UNRECORDED DEED—CIRCUMSTANCES EQUIVALENT TO NOTICE.

6. In a contest between opposing claimants under a judgment and an unrecorded deed an instruction that "the notice that will render a party a lienholder in bad faith must be something more than would excite the suspicion of a cautious and wary person. It must be so clear and undoubted, with respect to the existence of a prior right, as to make it fraudulent in him afterwards to take and hold the property," is correct: *Crossen v. Oliver*, 514.

PRIORITY BETWEEN JUDGMENT AND UNRECORDED DEED.

7. In a contest between rival claimants to land under a judgment and an unrecorded deed, it is not sufficient to instruct the jury that the judgment must have been taken in good faith and without notice or knowledge of such deed to give it precedence, but the manner and kind of notice should have been explained: *Crossen v. Oliver*, 514.

DEFECT OF PARTIES.

Pecuniary Relief in Equity—All Claimants Necessary. See PARTIES.

DEFINITIONS. Same as WORDS AND PHRASES.

DELAY.

When Delay Becomes Laches it is Fatal to Recovery. See EQUITY, 15.

DELIVERY OF DEED. See DEEDS, 8, 5.

DEMURRER.

Scope of Demurrer to One of Many Similar Causes of Suit. See PLEAD, 17.

DESCENT AND DISTRIBUTION.

FIRST LAW OF DESCENT OF REALTY IN OREGON.

Prior to the meeting of the legislature in 1853, there was no law of descent and distribution of real property in Oregon, and the act of December 14, 1853 (Laws, 1855, p. 383), which was the first law on that subject, did not go into effect until May 1, 1854: *Quinn v. Ladd*, at p. 267.

DESERTION.

Willful Desertion Justifying a Divorce. See DIVORCE, 3.

Duty of Deserted Spouse as to Reconciliation. See DIVORCE, 5.

Evidence of Offer of Reconciliation. See DIVORCE, 4.

DISBARMENT OF ATTORNEY.

Conduct Meant to Cause a Failure of Justice. See ATTORNEYS, 2.

DISCRETION OF COURT.

Continuance—Absence of Material Witness. See CONTINUANCE.

DISMISSAL. Same as NONSUIT.

DISMISSING APPEAL.

Consideration of Merits on Motion to Dismiss. See APPEAL, 17.

Voluminous Record—Laborious Investigation. See APPEAL, 19.

Changed Conditions—Moot Question. See APPEAL, 22.

DISTRICT ATTORNEYS.

DISTRICT ATTORNEY'S FEES IN DIVORCE CASES—REPEAL BY IMPLICATION.

1. The requirement of Section 1074, Hill's Ann. Laws, that the plaintiff in every

divorce suit shall pay a stated fee to the district attorney, is not affected by the acts of 1895 or 1899 relating to the fees of certain named officers, for neither the district attorney, his fees nor his duties are referred to therein: *State ex rel. v. Moore*, 536.

DISTRICT ATTORNEY'S FEES—IMPLIED REPEAL.

2. The act of 1898 placing the District Attorney of Multnomah County on a salary, and providing that the fees, percentages, commissions, and charges then established by law, or in any manner allowed for the performance of any act or duty required of that attorney, except services rendered for or on behalf of the state, or for or on behalf of Multnomah County, for which no charge shall be made, should continue and remain established fees; and that such officer should collect from the person or party for whom services should be rendered, or who might be charged with the payment thereof, did not repeal by implication Section 1074, Hill's Ann. Laws, as the exception in the act of 1898 as to services on behalf of the state was intended to apply to instances in which the district attorney had theretofore been authorized to charge and collect from the state, and not to cases where his fees were to be collected from private parties for whom the services are rendered, or who might have been charged with the payment thereof: *State ex rel. v. Moore*, 536.

DITCHES.

Formalities Formerly Required in Transferring Ditches Used for Mining Purposes. See MINES, 6, 7.

Distinction Between Method of Transferring Ditches Used for Mining and Ditches for Irrigation. See WATERS, 12.

DIVORCE.

CRUELTY AND PERSONAL INDIGNITIES.

1. A husband demanded of his wife that she compel her brother, who lived with them, to pay board. The wife objected to asking the brother to do so, out of gratitude to him for furnishing part of the money for the purchase of the home in which she and her husband lived. The brother was in the habit of coming home very late at night, to the disturbance of the household, and of rising late in the morning, thus disarranging the wife's breakfast plans. He would also sing vile songs in the presence of the family. *Held*, that the fact that the husband requested the brother to leave the house was not such "cruel and inhuman treatment" of his wife as to warrant a divorce under Hill's Ann. Laws, § 495, subd. 6: *Mendelson v. Mendelson*, 163.

PROVOCATION—MUTUAL FAULT.

2. A husband had threatened to inflict, and had actually inflicted, bodily injury on his wife ten years before she sued for a divorce. Both had violent tempers, but she did not fear him. No further trouble occurred between them until shortly before the suit was begun, when she made some exasperating remarks to him, and he told her to go into the house, or he would kill her with a monkey wrench. On another occasion he quarreled with plaintiff and her daughter, and threatened to throw a flatiron at them; calling them "sons of ——— and damned fools." A few months later she asked him for money; and he told her: "No; damn you! you have all you will get from me,"—and told her to collect board from her brother, who lived with them, to which she replied, "I will see you in hell first." Defendant gave money to plaintiff's brother, and she called him a "God-damned fool" for doing so. *Held*, that it appeared that defendant's conduct was provoked by plaintiff, and that she was not free from fault, and her suit for divorce was properly dismissed: *Mendelson v. Mendelson*, 163.

DESERTION—MEANING OF WILLFUL.

3. The word willful, as used in Hill's Ann. Laws, § 495, subd. 5, authorizing a divorce for "willful desertion," means an intentional forsaking, wrongfully and without cause, whereby the marital union is destroyed: *Ogilvie v. Ogilvie*, 171.

EVIDENCE OF "WILLFUL DESERTION."

4. A husband went on a trip to be absent several months, leaving ample provision for his family. A short time before he returned his wife left his home, and went to her relatives, in a distant city, without disclosing her intention to any of the members of her husband's family, or leaving any message for him. Her husband did not hear anything from her until about three months after her departure, when he met her, and she told him that she left because she had feared bloodshed on account of a man whose attentions to her he had objected to. *Held*, that the conduct of the wife amounted to a "willful desertion," and that the husband was entitled to a divorce on that ground, after the expiration of a year from her departure: *Ogilvie v. Ogilvie*, 171.

DUTY AS TO RECONCILIATION.

5. In cases of desertion the offending party may always return and offer a reconciliation, and if the injured spouse rejects such offer without other cause for continuing the separation, such spouse not only thereby consents to the existing condition, but assumes the position of an offender from that time. The injured party, however, need not make the first advance, but may safely rest on the situation already brought about: *Ogilvie v. Ogilvie*, 171.

INQUIRY AS TO WHAT MIGHT HAVE BEEN.

6. Disputes must be settled with reference to the existing facts, and not by conjecture or speculation as to what one of the parties would have done under a hypothetical state of facts; thus, where a wife has deserted her husband, he cannot be prejudiced by an inquiry whether he could or would have lived with her had she sought a reconciliation: *Ogilvie v. Ogilvie*, 171.

DESERTION—EVIDENCE OF OFFER TO RETURN.

7. The evidence does not satisfy the court that the wife ever made any genuine offer or attempt to return to her husband or to be reconciled after her desertion of him: *Ogilvie v. Ogilvie*, 171.

SEPARATION AGREEMENT—INFERENCE OF CONSENT TO DIVORCE.

8. A contract between husband and wife concerning their property interests, made after one of them has been so at fault as to warrant a divorce, is not a consent by either to a divorce, nor does it justify an inference that the cause of divorce was brought about by mutual consent: *Ogilvie v. Ogilvie*, 171.

SEPARATION AGREEMENT—PUBLIC POLICY.

9. A contract by which a husband agrees to pay certain moneys to his wife for her support for a stated period, not made for the purpose of securing a separation, but in contemplation of a divorce on account of the misconduct or disability of the husband, and without fault or inducement by the wife, is not void on grounds of public policy: *Henderson v. Henderson*, 141.

MODIFICATION OF SEPARATION AGREEMENT.

10. A decree carrying into effect the terms of an agreement between husband and wife by which the latter is to receive a certain sum per month for her support during her life after a divorce caused by the husband's misconduct, cannot afterward be modified by the court without the consent of both parties thereto: *Henderson v. Henderson*, 141.

MODIFICATION OF DIVORCE DECREE—ALIMONY.

11. A modification of the alimony clause of a divorce decree can be made only by a motion in the original suit. Under Section 502, Hill's Ann. Laws, the court retains jurisdiction for that purpose: *Corder v. Speake*, 105.

POWER TO MODIFY DECREE AS TO MAINTENANCE.

12. Under Hill's Ann. Laws, § 501, subd. 3 and 5, authorizing the court upon entering a decree of divorce to award against the party at fault an appropriate amount for the maintenance of the other, and section 502, authorizing the court on motion to set aside, alter or modify so much of a divorce decree as may have provided for the maintenance of either party, a divorce is not final nor *res judicata* between the parties as to such matters: *Henderson v. Henderson*, 141.

DONATION LAND LAW.

When Estates Became Vested Under the Donation Act. See PUBLIC LANDS, 1.

Right of Inheritance Acquired through Death of Donee Before Completing the Required Period of Residence. See PUBLIC LANDS, 1.

DOWER.

DOWER RIGHTS OF WIDOW IN DONATION CLAIM.

1. When a donation land claimant died before completing the required term of residence and occupation his widow did not acquire any dower right in his half of the claim, since he had not then acquired any estate therein: *Quinn v. Ladd*, 261.

RIGHT OF DOWER NOT AN INTEREST IN REALTY.

2. In the absence of a statutory provision, an unassigned right of dower is not such an interest in real property as can be reached by an execution: *Baer v. Ballingall*, 416.

POWER OF EQUITY TO ADMEASURE DOWER.

3. The jurisdiction of equity to act concurrently with courts of law in admeasuring dower in legal estates is now firmly fixed: *Baer v. Ballingall*, 416.

ASSIGNING DOWER—STATUTORY CONSTRUCTION.

4. Section 2861 of Hill's Ann. Laws, investing county courts with power to admeasure dower, does not deprive equity courts of their long-established jurisdiction over that subject, since there are no words indicating such an intention: *Baer v. Ballingall*, 416.

ASSIGNABILITY AND LIABILITY OF UNADMEASURED DOWER.

5. A right of dower may be assigned after it has become vested, and will be liable in equity for the debts of the wife: *Baer v. Ballingall*, 416.

PRACTICE IN SELLING DOWER RIGHT.

6. Where a widow's dower estate is decreed to be subject to the payment of her debts, it should be admeasured and assigned before being sold under execution, since the uncertainty existing before assignment would greatly affect the price obtainable at such sale: *Baer v. Ballingall*, 416.

EATING HOUSE.

Using Building for an Eating House—Railroad Purpose. See RAILROADS, 2.

ELECTIONS.

LAW GOVERNING SCHOOL ELECTIONS.

1. School elections are neither general nor special elections, and are not governed by the provisions of the general election law: *Breding v. Williams*, 433.

SCHOOL ELECTIONS—CHALLENGES—DUTY OF JUDGES.

2. If a voter at a school election is challenged, the judges of election need not ascertain his qualifications, but the duty rests on the voter to affirmatively show that he has a right to vote: *Breding v. Williams*, 433.

ELECTRICITY.

FALLEN ELECTRIC WIRE—REASONABLE CARE—QUESTION FOR JURY.

In an action for injuries occasioned by a live electric wire which had been blown down in a storm, an instruction that the defendant company could not excuse a delay in replacing such wire on the ground that they did not have a sufficient force to replace it sooner was erroneous, since the question whether the company exercised reasonable care was for the jury: *Boyd v. Portland Electric Company*, 567.

EMINENT DOMAIN.

TAKING PRIVATE PROPERTY FOR PUBLIC ROAD.

A road that will be open to the public to use, though in fact there may not be any public in the vicinity to use it, is still a public use of the property appropriated: *Fanning v. Gulliland*, 369.

EQUITY.

RIGHT TO SHOW SURETYSHIP—REMEDY AT LAW.

1. Where plaintiff, being sued as joint maker on notes, filed a complaint in equity in the nature of a cross bill, alleging that he was a mere surety, and that the holder was not a *bona fide* holder, the cross bill was properly dismissed, since plaintiff had an adequate remedy at law, by pleading and proving such defenses in the action at law on the notes: *Hughes v. Pratt*, 45.

SUBROGATION THROUGH A RECEIVER—JURISDICTION OF EQUITY.

2. A creditor who seeks to reach property in the hands of a receiver and have it applied to the payment of his claim should proceed in the receivership suit by petition, and not by an original suit in equity: *Goodnough v. Gatch*, 5.

RESTRAINING SALE ON VOID PROCESS—JURISDICTION OF EQUITY.

3. Under the general jurisdiction to prevent clouds on titles, equity will entertain a suit to restrain the threatened sale of realty on a void tax process: *Hughes v. Linn County*, 111.

CONTROLLING FUND WHERE SOME OF THE PARTIES ARE INSOLVENT.

4. Where several persons are claiming a fund, or parts of it, and a court of equity has control of such fund, it may restrain the payment thereof until the rights of all the claimants can be ascertained, and then divide it according to their respective rights, especially if some of the claimants are insolvent: *Wheeler v. Lack*, 28.

POWER OF EQUITY TO ADMEASURE DOWER.

5. The jurisdiction of equity to act concurrently with courts of law in admeasuring dower in legal estates is now firmly fixed: *Baer v. Ballingall*, 416.

EQUITABLE LIABILITY OF DOWER FOR WIFE'S DEBTS.

6. A right of dower may be assigned after it has become vested, and will be liable in equity for the debts of the wife: *Baer v. Ballingall*, 416.

EQUITABLE JURISDICTION TO DISREGARD A JUDGMENT.

7. Where real property belonging to an intestate's estate has been partitioned among the heirs without actual knowledge by any of them that property conveyed by intestate to certain of their number had been conveyed as advancements, equity will not impress on the lands apportioned to such grantees a lien in favor of the other heirs for their share of the advancements, in a collateral suit, though the discovery that the conveyances were advancements was not made until after rendition of the decree in the absence of actual fraud or concealment: *Belle v. Brown*, 588.

REMEDY FOR UNEVEN ADVANCEMENTS—HOTCHPOT.

8. Equity will not assume jurisdiction of a suit to impress an equitable lien for advancements on the undistributed shares of certain heirs of an intestate in lands admeasured as dower, which have reverted to the estate, and lands conveyed to all the heirs, as tenants in common, by another heir, to whom advancements were made, since, under Hill's Ann. Laws, §§ 3104, 3105, requiring such an advancement to be brought into hotchpot, suit in partition is the only remedy: *Belle v. Brown*, 588.

SUIT TO IMPEACH JUDGMENT—NATURE OF FRAUD.

9. In suits to set aside judgments or decrees, actual fraud with any intent to deceive the opposite party must be shown: *Belle v. Brown*, 588.

DISREGARDING JUDGMENT FOR NEW EVIDENCE.

10. Newly discovered evidence will not justify a court in subsequently either setting aside or disregarding a judgment or decree for errors of fact that may have occurred therein: *Belle v. Brown*, 588.

FRAUD—ADEQUATE REMEDY AT LAW.

11. B, being in possession of sundry valuable duebills, was induced by K, through certain fraudulent representations, to deliver them to him for the purpose of paying a debt of B's, but the duebills were hypothecated for K's personal debts. B thereupon began a suit in equity to secure a return of the duebills. Held, that an action of damages against K for deceit would not be as efficient as the remedy in equity, even if K was solvent: *Benson v. Keller*, 120.

PECUNIARY RELIEF—NECESSARY PARTIES.

12. Where equity is attempting to distribute a fund over which it has jurisdiction, all the persons who are known to have an interest in the fund must be brought in, and if it appears that any such person is not a party, the case should be reversed with instructions to bring him onto the record, so that the rights of all claimants may be settled in one decree: *Wheeler v. Lach*, 238.

QUIETING TITLE—WAIVING OBJECTION TO JURISDICTION.

13. In suits to determine adverse interests to realty the objection to the jurisdiction because the defendant is in possession must be taken by a proper plea, or it will not be considered; particularly is this true where the defendant asks affirmative equitable relief: *State v. Blize*, 401.

VALIDITY OF EQUITABLE ASSIGNMENT OF FUND.

14. An order from a contractor addressed to a city recorder, directing him to deliver to a certain company, from time to time, as certain street work should be accepted, warrants to be drawn by the city on the fund provided for that improvement, equal in amount to the value of materials to be furnished by said company and used in such work, is not an equitable assignment of the fund referred to or the contractor's claim thereon, for such order does not contain words of transfer, nor does it purport to assign any interest in the fund due, or that may become due, from such city to such contractor, on account of such improvement, nor is it directed to the debtor or custodian of the fund, nor is it an unconditional direction as to the disposal of the warrants: *Commercial National Bank v. Portland*, 33.

RECEIVERS—DISCHARGE—LACHES.

15. One of the defendants in a suit to foreclose a mortgage was injuriously affected by a decree which was entered on an erroneous mandate from the appellate court. She neglected, however, to apply to the supreme court for correction of the mandate for ten months after the receiver had been directed to distribute

the rents and profits in his hands, and for eight months after confirmation of the sale under the decree. After the decree had been corrected, she applied for an order vacating the distribution of rents formerly made by the receiver and for a redistribution, and for an order directing the receiver to place her in possession. *Held*, that the motion was properly denied on the ground of her laches; the former order directing payment by the receiver having been acquiesced in by her for nearly a year, during which the receiver had distributed the funds in accordance with the order of the court, and another party had taken peaceable possession: *Lombard v. Wade*, 428.

CONSTRUCTION OF PLEADINGS—EQUITY JURISDICTION.

16. Under the general rule that pleadings should be liberally construed to the accomplishment of substantial justice, *held*, that the complaint in this case was based on the theory that the land in question had been mortgaged by an instrument in the form of a deed, and that the suit was to determine that question, which is a proper subject of equity: *Wollenberg v. Minard*, 621.

EQUITY—TRIAL ON APPEAL—REFEREE'S REPORT.

17. Equity suits are tried *de novo* on appeal, and the report of a referee is not binding on the supreme court: *Wollenberg v. Minard*, 621.

See, also, CANCELLATION OF INSTRUMENTS, INJUNCTIONS, SPECIFIC PERFORMANCE, TRUSTS.

ERASURE.

Effect of Altered Return on Writ. See EVIDENCE, 8.

EQUITY MAXIMS.

Qui Fact per Alium Facit per se: *Watson v. Noonday Mining Co.* at p. 286.

ERROR. Same as APPEAL AND ERROR.

ESTATES OF DECEDENTS. Same as EXECUTORS AND ADMINISTRATORS.

ESTOPPEL.

LICENSE—ACQUIESCENCE AS AN ESTOPPEL ON REVOCATION.

1. If a party has paid a consideration for a license to do some act or series of acts on the land of another, or he has been encouraged in such acts by participation in a common enterprise, or has been induced by a definite oral agreement with the owner of the land to expend money in permanent and valuable improvements, the parol license upon the faith of which he has acted cannot be revoked to his prejudice; but a mere license by silence, or a mere failure to interfere, will not constitute an irrevocable permission, even when money has been expended in improving the property on a belief that the uninvited use relied upon would continue: *Hollock v. Suttor*, 9; *Miser v. O'Shea*, 231; *Ewing v. Rhea*, 583.

2. The fact that a riparian owner did not object when a lower riparian owner built a dam on her land, is not equivalent to a license to construct the dam; nor is this passive acquiescence such an encouragement to expend money in building the dam as will preclude to owner from enjoining its maintenance when completed: *Hallock v. Suttor*, 9.

3. The fact that defendant's grantors silently acquiesced in the construction by plaintiff, at considerable expense, of an irrigating ditch across their lands, did not estop defendant, prior to the expiration of the period of limitation, from cutting off the supply of water, plaintiff's right being a bare license, revocable at will: *Ewing v. Rhea*, 583.

4. A land owner who, as a favor, and without consideration, allowed an upper riparian proprietor to deposit on his property the tailings from the latter's mine, may revoke the permission at any time, since the tailings do not constitute a permanent improvement or addition to the land: *Miser v. O'Shea*, 231.

ESTOPPEL BY SILENCE—INTEREST OF PERSONAL ESTOPPEL.

5. To make a silent acquiescence operate as an estoppel it must appear that the person against whom the claim is made had some interest to be affected: *Mattis v. Hosmer*, 523.

LEAVE TO SUE AS AN ESTOPPEL AGAINST DISMISSING.

6. An order of court, obtained *ex parte*, and without notice to interested parties, authorizing a suit against a receiver, does not preclude the court from dismissing such suit on the ground that plaintiff has mistaken his remedy: *Goodnough v. Gutch*, 5.

HARMLESS ERROR—ESTOPPEL.

7. Where there is uncontradicted parol evidence, in an action against attorneys for negligence in examining a title, tending to show that plaintiff authorized her husband to employ defendants to make the examination, the admission of the record of a power of attorney from plaintiff to her husband, if error, is harmless, since, if the defendants were employed by the husband to act for the plaintiff, and did not act in that capacity, they cannot defend the action on the ground that the husband had no authority to employ them: *Currey v. Butcher*, 380.

ESTOPPEL TO CHANGE POSITION DURING TRIAL.

8. After a party has tried an action on a certain theory he cannot, on appeal, change his position and insist that his opponent has not performed some act that under the first position was immaterial. In other words, a party must be consistent throughout the trial and appeal: *Anderson v. Portland Flouring Mills Company*, 483; *Mattis v. Hosmer*, 528.

ESTOPPEL ON CHANGING CLAIM ON APPEAL.

9. Where both parties to a suit involving the right to a ditch based their claims on adverse rights, and neither alleged an appropriation of the water as the foundation of his claim, but the trial was had on the theory that defendant's grantor had appropriated the water and conveyed it as appurtenant to the land, and on appeal a decision was made, based on the theory of an appropriation of the water by plaintiff's grantor, it was too late for defendant to urge, on petition for rehearing, that the complaint did not allege any such appropriation by plaintiff's grantor; the case having been tried through by both sides on the theory of an appropriation, neither party will now be heard to claim otherwise: *Mattis v. Hosmer*, 528.

ESTOPPEL—REPRESENTATION OF TITLE—FRAUD.

10. Where one, with full knowledge of all facts, voluntarily represents to an intending purchaser of real estate that he has no interest therein, intending that such representation shall be acted upon, and the purchaser buys in consequence thereof, such conduct will estop the person who made the statements from afterward asserting title in himself, though he may have been ignorant of his rights, and may not have intended any actual fraud. In such a case fraud will be inferred: *Bluch v. Sammons*, 600.

EVICTION.

Sufficiency of Complaint in an Action for Damages. See PLEADING, 6.
Damages Recoverable Under General Allegation. See LAND AND TEN. 2.

EVIDENCE.**PRESUMPTIONS AS TO THE EXISTENCE OF A MARRIAGE.**

1. The presumption of a lawful marriage from the fact that the parties have lived together and cohabited as husband and wife does not arise where the proof indicates that the relations were entirely meretricious from their inception: *McBean v. McBean*, 185.

COMPETENCY—COINCIDENCE OF USUAL WEATHER CONDITIONS.

2. In an action to recover damages resulting from a fire caused by dropping from an engine in a stubble field ashes and coals the fire in which the defendants negligently failed to extinguish, it is proper to permit a witness who had lived in the country many years, and was familiar with climatic conditions, to testify as to the likelihood of a wind on the evening of a day such as that on which the fire causing the damage occurred; the likelihood of a wind arising being a material element in the question of defendants' negligence, as they had lived there many years and must have been familiar with local climatic conditions: *Lieuallen v. Mosgrove*, 446.

COMPETENCY—CONTRACTS IN RESTRAINT OF TRADE—EVIDENCE—DAMAGES.

3. In an action for breach of a contract not to re-engage in a business for a specified time, evidence of the quantity of goods purchased by defendant, and the sum paid therefor, on re-entering the business, being merely a basis for estimating his profit or loss, is inadmissible, since the profit accruing to or the loss sustained by defendant after re-entering the business is not an element of plaintiff's loss, nor a measure of his damages: *Dose v. Toole*, 13.

COMPETENCY OF STATEMENTS BY ALLEGED AGENT.

4. In a suit to enjoin the appropriation of water from a creek, testimony that a third party, who lived with plaintiff, made statements recognizing defendant's right to exclusive use of the water, and that at his request defendant permitted plaintiff to use the water for purposes of irrigation, was not admissible as against plaintiff, there being no proof of a general agency: *Mattis v. Hosmer*, 528.

MEMORANDUM AS EVIDENCE.

5. To render a memorandum admissible in evidence it must appear that the person who made it knew when he made it that it was true, and that he is now unable to state the facts except by using the statements therein contained: *Susewind v. Lever*, 365.

6. A memorandum made by a corporation's agent of the time an employee worked for it, and the compensation he was to receive, is not admissible in evidence without showing that the agent's memory was faulty respecting such statement, or that he knew it was true when he made it: *Susewind v. Lever*, 365.

JUDGMENT AS EVIDENCE OF DEBT AT THE DATE OF ITS RENDITION.

7. A judgment entered in the usual course of judicial proceedings is conclusive evidence against persons claiming under the debtor that he was justly indebted to plaintiff to the amount of such judgment at the date of its entry, in the absence of fraud and collusion: *Crossen v. Oliver*, 514.

ALTERED RETURN ON WRIT AS EVIDENCE—CODE, § 788.

8. The fact that an erasure appears in a sheriff's return on a writ does not render the return inadmissible in evidence, where it is shown that the erasure is in the sheriff's handwriting, and was made before the return was filed: *Crossen v. Oliver*, 514.

OPINION EVIDENCE AS TO THE CAUSE OF AN OCCURRENCE.

10. Where a complaint charged an overflow caused by negligence in permitting the head of a creek sewer to become obstructed, evidence of witnesses, who did not see the overflow, that in their opinion it was caused by improperly guarding the head of the sewer, and not placing men enough there to keep it clear, was improperly admitted, since the question of what caused the overflow was the very thing the jury was called upon to determine, and was not a proper subject for opinion evidence: *Chan Sing v. Portland*, 68.

PAROL EVIDENCE TO EXPLAIN COMMON WORDS.

11. Where a deed to a railroad company conveyed land "for all legitimate railroad, depot, and warehouse purposes," parol evidence of the understanding of the parties at the time the instrument was executed is not admissible to show that the words "legitimate railroad purposes" were used with a particular or special meaning. Being ordinary and usual words, no peculiar signification can be attached to them by parol evidence: *Abraham v. Oregon & California Railroad Company*, 455.

PAROL EVIDENCE TO VARY WRITING—PATENT AMBIGUITY.

12. In a suit involving a written lease of a ditch, providing that the lessee shall make a certain payment of rent thirty days after he shall commence using the waters of such ditch in placer mining, it cannot be shown by parol evidence that such payment was to be made at another time; first, because it is an attempt to vary by parol the terms of an unambiguous writing, and, second, if it is ambiguous, the ambiguity is patent and not latent, and cannot be explained by extrinsic evidence: *Tallmudge v. Hooper*, 508.

PAROL EVIDENCE TO SURETYSHIP ON NOTE.

13. It is competent, as against a holder with notice of the facts, for an apparent maker of a note to show by parol that he is in reality only a surety: *Hughes v. Pratt*, 45.

PAROL EVIDENCE—NOTE—BONA FIDES.

14. It is always competent for an apparent maker of a promissory note, when sued thereon, to show that the plaintiff is not a genuine holder of the note, or any lack of bona fides: *Hughes v. Pratt*, 45.

EVIDENCE OF FOREIGN INCORPORATION.

15. Where plaintiff, an alleged corporation, introduced what purported to be articles of incorporation, together with properly attested certificates of officers of the state certifying that said corporations had been duly incorporated under certain specified laws, the evidence was insufficient to prove the corporate existence of itself and its assignor, it being necessary to put in evidence a copy of the laws under which they were incorporated: *Law Trust Society v. Hogue*, 54.

SUFFICIENCY OF EVIDENCE—CONTRADICTION BY PHYSICAL FACTS.

16. The testimony for both parties is reviewed and it is decided that the plaintiff's testimony was not sufficiently contradicted by physical facts to warrant the direction of a verdict for the defendant. If the established physical facts should conclusively show that the testimony of a witness could not be true, then it would probably be the duty of the court to reject such testimony, but such is not the case here: *Smitson v. Southern Pacific Company*, 74.

SUFFICIENCY OF EVIDENCE—PUBLIC LANDS.

17. Where, in an action to enjoin interference with plaintiff's water right there was uncontradicted evidence that plaintiff's grantor was operating a placer mine on public land in 1888, at the head of the ditch in question, and was using the water therefrom, and in 1873 made a homestead entry on such land, and in 1878 made final proof of settlement and cultivation, it was sufficient to justify a finding that the land was government land at the time of the appropriation of water by plaintiff's grantor: *Mattes v. Homer*, 523.

PAROL EVIDENCE TO EXPLAIN WAREHOUSE RECEIPTS.

18. A statute which makes warehouse receipts "negotiable" by indorsement and provides that such indorsement shall be deemed a valid transfer of the commodity for which the receipt was given, does not make the receipts negotiable in the sense that promissory notes are negotiable, and oral testimony may be received to show the facts connected with the issuing of the receipts and the true relation to the transaction of the parties whose names appear on the paper: *Anderson v. Portland Flouring Mills Company*, 483.

EXCEPTIONS, BILL OF.

AMENDING BILL OF EXCEPTIONS AFTER APPEAL.

Where the bill of exceptions as filed in the supreme court is incomplete or incorrect, the proper practice is to secure a proper amendment by the trial court, and then file it as part of the record on appeal. This is preferable to remitting the transcript for correction: *Block v. Sammons*, 600.

EXECUTION.

Dower should be admeasured before it is offered for sale, as the uncertainty attending it, if unassigned, would embarrass the sale: *Baer v. Ballingall*, 416.

EXECUTORS AND ADMINISTRATORS.

REMOVAL OF ADMINISTRATOR—CONFLICT OF INTEREST AND DUTY.

In view of Hill's Ann. Laws, § 1167, providing that when the estate of a decedent is insolvent, and deceased has made in his lifetime a conveyance of property which is void as against creditors, it is the duty of the administrator to petition the county court for leave to sue to set such conveyance aside, an administrator of an insolvent estate who is one of the grantees in a series of deeds claimed by creditors to be void for lack of consideration should be removed without regard to the question whether the conveyances are void, since one whose personal interests are in conflict with his duty as administrator is not a proper person to hold the office: *Marks v. Coats*, 609.

FEES

Of District Attorneys Under Act of 1895. See DISTRICT ATTORNEYS, 1.

Of District Attorney in Multnomah County. See DISTRICT ATTORNEYS, 2.

Of Witness—Nonattendance—Action for Damages. See WITNESSES, 1.

FILING TRANSCRIPT.

Time for Filing—Allowance of Extensions. See APPEAL, 6.

FINAL ORDERS. See APPEAL, 12, 13.

FIXTURES.

CHATELS—ANNEXATION TO REALTY.

Where an engine, boiler and sawmill machinery are placed on leased ground under an agreement that they should not become realty, they will retain their distinctive identity unless they are so annexed to the land that their removal will injure the land or destroy their value: *Hershberger v. Johnson*, 109.

FLOODING PROPERTY.

Negligence in Obstructing Sewer—Evidence. See NEGLIGENCE, 1.

Contribution of Defendant to Injury—Action. See NEGLIGENCE, 9.

FRAUD.

EFFECT OF FRAUD ON EXECUTED LEGAL CONTRACT.

1. Where a contract has been executed between competent parties, founded on a valuable consideration, and not legally objectionable or inherently wrong, it is valid and binding between the parties, regardless of fraud practised in securing its execution: *State v. Blize*, 404.

SUIT TO IMPEACH JUDGMENT—NATURE OF FRAUD.

2. In suits to set aside judgments or decrees, actual fraud with an intent to deceive the opposite party must be shown: *Belle v. Brown*, 588.

ESTOPPEL—REPRESENTATION OF TITLE—FRAUD.

3. Where one, with full knowledge of all facts, voluntarily represents to an intending purchaser of real estate that he has no interest therein, intending that such representation shall be acted upon, and the purchaser buys in consequence thereof, such conduct will estop the person who made the statement from afterward asserting title in himself, though he may have been ignorant of his rights, and may not have intended any actual fraud. In such a case fraud will be inferred: *Bloch v. Sammons*, 600.

GARNISHEE.

Waiving Service of Process. See ATTACHMENT, 1.

Waiving Service of Allegations. See ATTACHMENT, 2.

GENERAL DAMAGES.

Distinction Between General and Special Damages. See DAMAGES, 1.

What Damages are Recoverable Under General Allegation. See DAMAGES, 1.

GOVERNMENT LANDS. Same as PUBLIC LANDS.

HARMLESS ERROR. See APPEAL, 27, 28.

HIGHWAYS.

1. Hill's Ann. Laws, § 4069, authorizes an appeal to the circuit court from the assessment of damages sustained by parties over whose land a public road is sought to be laid. Section 555, as amended by Laws, 1889, pp. 134, 135, authorizes a writ of review concurrent with the right of appeal. *Held*, that an appeal from the assessment of damages does not waive the right to have the proceedings establishing the road reviewed by writ of review, since, on an appeal under section 4069, a review of the regularity of the proceedings establishing the road can not be had: *Fanning v. Gilliland*, 369.

OPENING HIGHWAY—APPEAL—WRIT OF REVIEW.

2. An appeal from the award of damages in a proceeding for opening a public road does not preclude the right to review the regularity of the proceedings establishing such road: *Fanning v. Gilliland*, 369.

CONSTITUTIONAL LAW—EMINENT DOMAIN—HIGHWAYS.

3. Where a road sought to be laid over private property will be open, when laid, to all who may desire to use it, the laying of the road will not constitute a taking of private property for private use, forbidden by the constitution, though it may in fact accommodate but a single family: *Fanning v. Gilliland*, 369.

NECESSITY FOR HIGHWAY—LEGISLATIVE QUESTION.

4. The allegation in a petition for a public road over private property that it is necessary, and that the property of the petitioners cannot be reached by any convenient highway, is not issuable, since the manner of its determination is a legislative question, and since the legislature has provided that the appearance of these facts in the petition shall be sufficient to authorize the court to appoint viewers to lay out the road: *Fanning v. Gilliland*, 369.

DAMAGES BY OPENING HIGHWAY—POLITICAL QUESTION.

5. The report of viewers appointed by the court to lay out a public road over private property that the road has been so laid as to cause the least damage is not issuable, since the question raised is political in its nature, and the procedure authorized by the legislature for its ascertainment makes provision for a hearing only on the ultimate question of compensation for the damage: *Fanning v. Gilliland*, 369.

CONSTRUCTION OF REPORT OF VIEWERS.

6. Where viewers were appointed and directed to lay out a road according to the prayer of the petition therefor, and assess the damages, and they reported that they had laid out the road "upon the most practicable route, and in accordance with the petition, and so as to do the least possible damage to the land over which it passed," it sufficiently appears that the route adopted was the best one in their judgment: *Fanning v. Gilliland*, 369.

TAKING PRIVATE PROPERTY—VALIDITY OF ORDER OPENING HIGHWAY.

7. An order of a county court confirming the report of viewers, declaring the road in question to be a public highway, and ordering it opened on payment of the costs and assessed damages, is not void, though at the time of entering it the damages and costs had not been paid, since by its terms there was no taking of property except on condition of the payment of damages: *Fanning v. Gull-land*, 389.

CONTRIBUTORY NEGLIGENCE—ICY HIGHWAY—NEGLIGENCE OF COUNTY.

8. An icy road ran down a steep hill along a gulch, making a sharp turn about fifty rods from the bottom. As plaintiff, who knew its condition, was driving down the road with a heavy load, his horses slid on the ice, and were precipitated into the gulch with the load. His harness had no breeching, and his horses were unshod. *Held*, that the questions whether plaintiff was guilty of contributory negligence, and whether a negligent construction and maintenance of the road was the proximate cause of the occurrence, should have been submitted to the jury, since it was incumbent on plaintiff to exercise only that degree of care commensurate with the danger: *Gardner v. Wasco County*, 392.

HOTCHPOT.

Remedy for Uneven Advancements. See EQUITY, 7, 8.

HOTEL.

Using Land for Legitimate Railroad Purposes. See RAILROADS, 2.

HUSBAND AND WIFE.

CURTESY IN DONATION LAND CLAIM.

1. Until the completion of the prescribed term of residence and occupation on a donation land claim neither spouse had any estate in the land, and, consequently, neither could inherit from the other any interest therein: *Ladd v. Quinn*, 261.

VALIDITY OF SEPARATION AGREEMENT PENDING DIVORCE.

2. A contract by which a husband agrees to pay certain moneys to his wife for her support for a stated period, not made for the purpose of securing a separation, but in contemplation of a divorce on account of the misconduct or disability of the husband, and without fault or inducement by the wife, is not void on grounds of public policy: *Henderson v. Henderson*, 141; *Ogilvie v. Ogilvie*, 171.

HYPOTHETICAL PLEADING. Remedy for. See PLEADING, 4.

ICE.

Icy Highway—Negligent Construction—Contributory Carelessness of Traveler—Question for Jury. See NEGLIGENCE, 3, 4.

IMPEACHMENT of Witness.

Cross-Examination—Foundation for Contradiction. See WITNESSES, 3.

IMPROPER ARGUMENT OF COUNSEL.

Objection—Ruling of Court is Necessary. See TRIAL, 1.

INDIANS.

MARRIAGE ACCORDING TO INDIAN CUSTOM.

1. Where a marriage has taken place between two members of an Indian tribe, or between a white person and a member of the tribe, according to tribal customs, the union is binding everywhere in the United States: *McBean v. McBean*, 195.

DESCENT OF INDIAN LANDS—REPEAL OF STATUTE.

2. Supp. Rev. St. U. S. p. 898, § 5, providing that, for the purpose of determining the descent of land to the heirs of Indians, the offspring of Indians who have cohabited together as man and wife shall be deemed to be legitimate, is general in its purpose, and does not repeal or in any way affect the special act of 1885, relating to the allotment of lands to the Umatilla Indians, and enacting that the law of alienation and descent in force in the State of Oregon shall apply thereto: *McBean v. McBean*, 195.

INDIAN LANDS—LAW OF DESCENT.

3. The only rule for determining the descent of real property belonging to an allottee of land within the Umatilla Indian Reservation is that provided by the statutes of Oregon: *Non-She-Po v. Wa-Win-Ta*, 213.

VALIDITY OF ADOPTION BY INDIAN CUSTOM.

4. An adoption of another's child can never be accomplished by merely caring for and rearing it, even if such be the custom of the community or tribe or nation where the persons lived: *Non-She-Po v. Wa-Win-Ta*, 213.

INFERENCE

Of Fraud—Misrepresentation of Title to Realty. See FRAUD, 3.

INFORMATION AND BELIEF.

Pleading Lack of Knowledge or Information Sufficient to Form a Belief—Sufficiency of Denials. See PLEADING, 11.

Sufficiency of Affidavit of Contempt of Court Made on Information and Belief. See CONTEMPT.

INJUNCTION.

DESTRUCTIVE TRESPASS ON MINES.

1. A court of equity will restrain a person preparing to extract ores from another's mine, though a trespass, since such extraction would destroy the substance and value of plaintiff's estate: *Muldrick v. Brown*, 185.

TRESPASS ON MINING CLAIM—SINGLE INTRUSION.

2. While the practice as to restraining trespassing on mining property is liberal, to prevent the destruction of the substance of the estate; yet a single act of trespass will not justify the interposition of equity: *Parker v. Furlong*, 248.

ENJOINING TRESPASS—INSOLVENCY OF DEFENDANTS.

3. The mere insolvency of the defendant is never of itself a reason for issuing an injunction in cases of trespass; there must be some other equitable ground for interference: *Parker v. Furlong*, 248.

DAMS ON NONNAVIGABLE STREAMS.

4. A court of equity will hesitate to enjoin a lower appropriator from damming the stream unless it is clear that the upper proprietor will be injured. That is not sufficiently evident in this case to justify equitable interference: *Blair v. Boswell*, 168.

INJUNCTION TO RESTRAIN COLLECTION OF ILLEGAL COSTS.

5. Equity will interfere by injunction to restrain the collection of costs irregularly taxed without complying with the requirements of the statute as to notice, where the remedy at law is not available owing to the irregular practice of the taxing party, and the collection of such costs would be a manifest wrong: *Rader v. Barr*, 443.

6. Hill's Ann. Laws, § 556, provides that a cost bill shall be filed within five days after entry of judgment, or, if not filed until later, a copy thereof must be served on the opposite party, and that the opposite party must file objections within two days from the time allowed to file the bill. *Held*, that the allowance of costs not objected to, where made more than five days after the entry of judgment without copy served on the opposite party, was a sufficient ground to restrain their collection by injunction: *Rader v. Barr*, 458.

EQUITY—TAXPAYER'S INJUNCTION AGAINST ILLEGAL CONTRACT.

7. An individual taxpayer may maintain a suit to enjoin the illegal diversion of public funds or property when it appears that the result of such diversion will be to increase the rate of taxation to be borne by all taxpayers: *Burness v. Mulnomah County*, 460.

INSTRUCTIONS TO JURIES.

Desired Instructions Should be Prepared and Requested. See TRIAL, 10.

Entire Charge to the Jury Must be Considered. See TRIAL, 11.

Province of Jury—Presenting Respective Theories. See TRIAL, 12.

Refusing Instructions Already Substantially Given. See TRIAL, 14.

Propriety of Instructions on Abstract Propositions. See APPEAL, 29.

Inconsistent Charges Not Always Error. See TRIAL, 13.

INTEREST.

Increased Rate After Default Not Usury. See USURY.

IRRIGATION. Same as WATERS AND WATER RIGHTS.

JUDGMENTS AND DECREES.

DIVORCE—POWER TO MODIFY DECREE.

1. The terms of a divorce decree awarding alimony are not final and may subsequently be amended upon motion in the original case; but when the decree is based upon and made in accordance with an agreement between the parties, it is final, and can be modified only by consent: *Henderson v. Henderson*, 141; *Ogilvie v. Ogilvie*, 171.

COLLATERAL ATTACK—EFFECT OF RECITALS.

2. Where a journal entry of a final order recited that minor defendants had been duly served as by law required, "as shown by the return of the sheriff," such return was made the basis of the recital, and was an essential part thereof; and, where such return was insufficient, such recital was not conclusive in a collateral attack on the final order entered thereon, since it then affirmatively appears on the face of the record that the court did not have jurisdiction: *Harris v. Sargeant*, 41.

COLLATERAL ATTACK—CONCLUSIVENESS OF JUDGMENT.

3. Judgments and decrees are conclusive as to what was actually litigated, and as to what might properly have been litigated in the proceeding, unless the failure to urge the point in question was caused by the adversary's fraud, and was without negligence of the losing party: *Belle v. Brown*, 588.

4. The judgment or decree of a court having jurisdiction to pronounce the same, is, in respect to the matter directly determined, or actually and necessarily included therein, conclusive upon the parties and those asserting subsequent claims under them, until reversed by some direct proceeding, and cannot be collaterally attacked: *Belle v. Brown*, 588.

5. Where real property belonging to an intestate's estate has been partitioned among the heirs without actual knowledge by any of them that property conveyed by intestate to certain of their number had been conveyed as advancements, equity will not impress on the lands apportioned to such grantees a lien in favor of the other heirs for their share of the advancements, in a collateral suit, though the discovery that the conveyances were advancements was not made until after rendition of the decree, in the absence of actual fraud or concealment: *Belle v. Brown*, 588.

SETTING ASIDE JUDGMENT FOR NEWLY DISCOVERED EVIDENCE.

6. Newly discovered evidence will not justify a court in subsequently either setting aside or disregarding a judgment or decree for errors of fact that may have occurred: *Belle v. Brown*, 588.

SUIT TO IMPEACH JUDGMENT—NATURE OF FRAUD.

7. In suits to set aside judgments or decrees, actual fraud with an intent to deceive the opposite party must be shown: *Belle v. Brown*, 588.

POWER TO VACATE CONSENT DECREE.

8. After the expiration of the term during which it has been entered, a consent decree cannot be attacked or impeached in any manner except by an original bill: *Stiles v. McGee*, 574.

9. Hill's Ann. Laws, § 102, provides that the court may relieve a party from a judgment, order, or other proceeding taken against him through his mistake or excusable neglect. Plaintiffs, claiming ownership of one hundred and sixty inches of water from a certain creek, sued to enjoin defendants from interfering with their use thereof. Before issue was joined the parties stipulated in writing that plaintiffs were entitled to one hundred and forty inches, and that a decree should be entered accordingly. Thereafter defendants moved that the decree be set aside because the stipulation was made, and consent to the decree given, under a mutual mistake. *Held*, that the motion should be denied, since the decree itself was entered with defendants' express consent: *Stiles v. McGee*, 574.

JUDGMENT AS EVIDENCE OF DEBT AT THE DATE OF ITS RENDITION.

10. A judgment entered in the usual course of judicial proceedings is conclusive evidence against persons claiming under the debtor that he was justly indebted to plaintiff to the amount of such judgment at the date of its entry, in the absence of fraud and collusion: *Crossen v. Oliver*, 514.

MECHANICS' LIEN—DECREE EXCEEDING SUM DUE CONTRACTOR.

11. In a mechanics' lien case the decree may under some circumstances be given for an amount exceeding the sum due the contractor: *Watson v. Noonday Mining Company*, 287.

WAIVER OF OBJECTION TO JURISDICTION.

12. Where the state brought a suit to remove defendants' claim to land, as a cloud on the title, the fact that defendants were in possession of the land at the time the suit was brought did not render a judgment in favor of plaintiff void for want of jurisdiction, where defendants did not raise the question of jurisdiction in the trial court, but themselves asked for equitable relief against plaintiff: *State v. Blize*, 404.

SUFFICIENCY OF VERDICT—JUDGMENT.

13. Where defendant admitted part of the debt claimed by plaintiff a verdict for defendant is properly construed to be a finding for defendant as to all the plaintiff's claim except the amount conceded. In such a case the verdict may be considered as if amended to conform to the evident intention of the jury, and judgment given accordingly: *Lew v. Lucas*, 208.

PRIORITY BETWEEN JUDGMENT AND UNRECORDED DEED.

14. In a contest between rival claimants to land under a judgment and an unrecorded deed, it is not sufficient to instruct the jury that the judgment must have been taken in good faith and without notice or knowledge of such deed to give it precedence, but the manner and kind of notice should have been explained: *Crossen v. Oliver*, 514.

JUDGMENT LIEN DOCKET—TRANSCRIPT TO ANOTHER COUNTY.

15. Hill's Ann. Laws, § 572, requires the judgment docket to show when judgments were docketed. Section 289 enacts that the plaintiff may file a certified transcript of the original docket in the county clerk's office of any county of the state, and that the clerk of the latter county shall docket it in the judgment docket of his office, and it shall be a lien on the real property of the defendant in the county. The docket entry of the county where a judgment was rendered failed to show when the entry was made. An abstract of the docket entry of the judgment certified to the clerk of another county did not state, nor was it reasonably inferable therefrom, that the judgment was docketed in the county where the judgment was rendered, nor did the clerk's certificate state that the abstract was a transcript of the original docket, as required by section 289. The judgment came within the provisions of sections 283 and 284, requiring its entry in the journal within the day rendered, unless otherwise ordered by the court, and section 289, requiring the clerk immediately thereafter to docket it in the judgment docket. *Held*, that the docketing of such transcript in the latter county did not create a lien on the judgment defendant's real estate in that county, since subsequent purchasers of such real estate were not charged with constructive notice of more than could be discovered by an inspection of the transcript; the facts therein recited not being sufficient to create a lien in the latter county, both because the original docket does not show the date when the judgment was docketed, and because the copy does not purport to be a transcript of the original judgment docket: *Hutchinson v. Gorham*, 347.

JURISDICTION.

Justices' Courts—Territorial Extent of Power of. See JUSTICES OF THE PEACE.
Quietting Title—Waiving Defect in Jurisdiction. See PLEADING, 25.

JUSTICES OF THE PEACE.**AREA OF JURISDICTION.**

A justice of the peace has jurisdiction only within the county where the court sits, and the defendant must be found within that territory: *Pierce v. Rock Creek Mining Company*, 342.

LACHES.

Effect of on Rights Originally Enforceable. See EQUITY, 15.

LANDLORD AND TENANT.**PLEADING EVICTION—SUFFICIENCY OF COMPLAINT.**

1. A complaint in an action by a tenant against his landlord for being wrongfully evicted from rented lands, which states that under the lease the landlord had a right to terminate the occupation on notice whenever he desired to use the lands for some purpose other than that for which they had been rented; that the landlord gave such notice, and that the tenant peaceably surrendered possession and

in consequence thereof; that the said notice was given in bad faith and for the purpose of evicting plaintiff, and that the landlord had continued to use the lands for the same purpose for which they had been rented, states a cause of action for wrongful eviction as against a motion for judgment on the pleadings at the trial: *Salzgeber v. Mickel*, 216.

EVICTIION—DAMAGES RECOVERABLE UNDER GENERAL ALLEGATION.

2. Where an action is brought by a tenant against his former landlord for an eviction, based on the wrongful action and bad faith of the landlord, the natural and approximate damages resulting from the breach of the lease may be shown under an allegation of general damages: *Salzgeber v. Mickel*, 216.

BREACH OF CONTRACT—DAMAGES—WHEN ACTION MAY BE BROUGHT.

8. Where the breach of a lease is total, an action for both present and prospective damages may be maintained without waiting the expiration of the time required for the full performance of the contract: *Salzgeber v. Mickel*, 216.

WHEN RENT IS DUE UNDER A CROP LEASE.

4. Where land is leased for a part of the crop to be raised thereon, and there is no stipulation as to the time of payment, the share is due when the crop is harvested or within a reasonable time thereafter: *Jones v. Adams*, 478.

LATIN MAXIMS.

Qui Facit per Alium Facit per se: *Watson v. Noonday Mining Co.*, at p. 298.

LAWS OF OREGON.

For Compiled Laws. See **STATUTES OF OREGON**.

For Uncompiled Laws. See **SESSION LAWS**.

LEASE.

When Rent is Due Under Crop Leases. See **LANDLORD AND TENANT**, 4.

LEAVE TO SUE.

Actions on Bonds of Public Officials—Time to Urge Defense of Want of Leave to Sue. See **APPEAL**, 14.

Effect of Permission to Sue Receiver—Jurisdiction. See **ESTOPPEL**, 6.

LEGAL MAXIMS. See **LATIN MAXIMS**.

LEGISLATIVE QUESTION.

Method of Determining Necessity for Highway. See **STATES**, 1, 2.

LICENSE.

CONDUCT NOT AMOUNTING TO A PAROL LICENSE.

1. The fact that a riparian owner upon a navigable stream made no objection when a lower riparian owner announced his intention to build a dam on her land, is not equivalent to a license to construct the dam: *Hallock v. Sutor*, 9.

LICENSE—ACQUIESCENCE AS AN ESTOPPEL.

2. The fact that defendant's grantors silently acquiesced in the construction by plaintiff, at considerable expense, of an irrigating ditch across their lands, did not estop defendant, prior to the expiration of the period of limitation, from cutting off the water supply, plaintiff's right being a bare license, revocable at will: *Ewing v. Rhea*, 583.

REVOCABILITY OF PAROL LICENSE.

8. Where a person, in reliance upon a parol agreement, makes permanent valuable improvements on the land of another, the license upon the faith of which such improvements were made cannot be revoked to the prejudice of the licensee; but such improvements must be permanent in their nature to estop the grantor from revoking the license at his pleasure, and they must have been made under an express consent or what amounts to the same thing. A mere failure to object will not usually be sufficient: *Hallock v. Sutor*, 9; *Miser v. O'Shea*, 281; *Mattis v. Hosmer*, 523; *Ewing v. Rhea*, 583.

LIEN. See, also, **MECHANICS' LIENS**.

Judgment Lien—Sufficiency of Transcript From County Where the Judgment was Obtained. See **JUDGMENTS**, 15.

LIMITATION OF ACTIONS.

ACTIONS ON STATUTORY BONDS OF SHERIFFS.

1. An action on a sheriff's undertaking for the faithful performance of his duties as tax collector is based on a liability created by statute, and it is governed, in respect to the time of its commencement, by Hill's Ann. Laws, § 8, subd. 2, providing that an action on a liability created by statute shall be commenced within six years, and not by section 7, subd. 1, providing that "an action against a sheriff on a liability incurred by the doing of an act in his official capacity and in virtue of his office shall be commenced within three years," which refers only to actions on liabilities incurred while discharging his ordinary functions: *Multnomah County v. Kelly*, 1.

ACTIONS RELATING TO UNPATENTED MINING CLAIMS.

2. The ten-year limitation provided by Section 882, Hill's Ann. Laws, concerning suits for the determination of an interest in real property, does not apply to a suit for the specific performance of a contract to convey an unpatented mining claim, since until the statute is complied with, the interest in the mine is not realty: *Herron v. Eagle Mining Company*, 155.

MINING CLAIM—WHEN STATUTE BEGINS TO RUN.

3. The statute of limitations does not run against the right to a mining claim until the issuance of the patent; in other words, there can be no holding adverse to the United States: *Miser v. O'Shea*, 231.

LOGS AND LOGGING.

FLOATABLE STREAMS ARE NAVIGABLE.

A stream capable of floating logs and timbers to market is a navigable stream, and is not deprived of its navigable character by the fact that for a portion of the year it cannot be used for that purpose: *Hallock v. Suitor*, 9.

MALICE.

Necessity for in Actions for Abuse of Process. See PROCESS, 3.

MALICIOUS PROSECUTION.

ABUSE OF PROCESS—MALICE—PROBABLE CAUSE.

In an action to recover damages for wrongfully suing out an injunction, malice and want of probable cause must be alleged and proved: *Hess v. German Baking Company*, 277.

MARRIAGE.

EVIDENCE OF MARRIAGE.

1. Upon a consideration of the testimony herein, *held*, that it is not sufficient to establish a marriage of plaintiff's ancestor: *McBean v. McBean*, 195.

PRESUMPTION AS TO THE EXISTENCE OF MARRIAGE.

2. The presumption of a lawful marriage from the fact that the parties have lived together and cohabited as husband and wife does not arise where the proof indicates that the relations were entirely meretricious from their inception: *McBean v. McBean*, 195.

MATERIALMAN'S LIEN. Same as MECHANICS' LIEN.

MAXIMS. See LATIN MAXIMS.

MECHANICS' LIEN.

A MINE NOT A STRUCTURE.

1. Neither a mine nor a mining claim is a "structure" within the meaning of Section 3669 of Hill's Ann. Laws: *Watson v. Noonday Mining Company*, 287.

LIEN ON MILL AND TRAMWAY.

2. A lien may be enforced against a mill used in connection with a mine, under Section 3669, Hill's Ann. Laws, or against a tramway from the mine to the mill, since each is a structure by itself: *Watson v. Noonday Mining Company*, 287.

MECHANICS' LIENS—JUDGMENT AGAINST OWNER.

3. The decree in this case, though it may seem to be personal against the property owner for the amount of the contractor's debts, is not so when closely examined: *Watson v. Noonday Mining Company*, 287.

DECREE EXCEEDING SUM DUE ON THE CONTRACT.

4. In a mechanics' lien case the decree may under some circumstances be for an amount exceeding the balance due the contractor: *Watson v. Noonday Mining Company*, 287.

MEMORANDUM as Evidence.

Conditions Under Which Writing is Competent. See EVIDENCE, 5, 6.

MENTAL CAPACITY.

Evidence not Showing Mental Incapacity. See DEEDS, 4.

MENTAL SUFFERING as an Element of Damages. See DAMAGES, 2.

MINES AND MINERALS.

INJUNCTION AGAINST DESTRUCTIVE TRESPASS ON MINES.

1. A court of equity will restrain a person preparing to extract ores from another's mine, though a trespass, since such extraction would destroy the substance and value of plaintiff's estate: *Muldrick v. Brown*, 185.

IDEM—SINGLE TRESPASS.

2. While the practice as to restraining trespassing on mining property is liberal, to prevent the destruction of the substance of the estate; yet a single act or trespass will not justify the interposition of equity: *Parker v. Furlong*, 248.

RIGHT TO USE STREAM TO CARRY OFF TAILINGS.

3. The authorities are divided as to whether an upper riparian proprietor has a servitude on the stream to carry off the tailings from his placer mine, but, if the point be conceded, it is immaterial here, because the crest of the dam complained of is seventy feet below the lower line of plaintiff's claim so that there is no reasonable probability of his land being flooded, or the debris from his mine being left on his claim: *Turner v. Locy*, 158; *Blair v. Boswell*, 188.

INTEREST OF LOCATOR OF MINE—STATUTE OF LIMITATIONS.

4. The interest acquired by a locator in possession of a mining claim prior to his compliance with provisions of United States statutes entitling him to a patent is merely personality, and not an interest in real property, from which it follows that the ten-year limitation provided by Section 362, Hill's Ann. Laws, concerning suits for the determination of an interest in real property, does not apply to a suit for the specific performance of a contract to convey an unpatented mining claim: *Herron v. Eagle Mining Company*, 155.

AMOUNT OF ORE REQUIRED TO SUPPORT A CLAIM TO A MINE.

5. Under Rev. St. U. S. § 2320, requiring the discovery of a vein or lode within a quartz claim before any right can be acquired thereto, it is enough to entitle the discoverer to protect his mining rights if ore or metalliferous rock be found in place sufficient to warrant a prudent man in spending time and money on it, though it may not contain ore in paying quantities: *Muldrick v. Brown*, 185.

METHOD OF TRANSFERRING MINING DITCH.

6. Under Hill's Ann. Laws, § 3833, which declared that ditches used for mining purposes should be regarded as real estate during such use, and section 3834, providing that they should be governed in their sale and transfer by the law applicable to such property, an interest in a ditch used for mining purposes could not, while those sections were in force, be transferred except by deed: *Mattis v. Hoamer*, 523.

TRANSFER OF MINING DITCHES.

7. A ditch used for irrigating purposes is an appurtenance to the land which it waters, but while Sections 3833 and 3834, Hill's Ann. Laws, were in force a mining ditch could not be transferred except by the formalities required in conveying real property. These sections were enacted October 29, 1870, and were repealed October 14, 1898: *Mattis v. Hoamer*, 523.

MECHANICS' LIEN—MINE NOT A STRUCTURE.

8. A mine or mining claim is not a "structure" within the meaning of Section 3609, Hill's Ann. Laws, which confers the right to a lien for material or labor used in any structure, so that a mill and a tramway thereto from a mine are structures by themselves, and a lien may be enforced against them without reference to the mine: *Watson v. Noonday Mining Company*, 287.

MISCONDUCT OF COUNSEL.

Improper Address to Jury—Ruling of Judge Thereon. See APPEAL, 26.

MISJOINDER OF PARTIES.

Multifariousness Arising From Misjoinder. See PLEADING, 3.

MOTIONS.

Theory of Motion to Affirm a Judgment. See APPEAL, 18.

Theory of Motion to Dismiss an Appeal. See APPEAL, 18.

Motion to Dismiss—Consideration of Merits. See APPEAL, 17.

MONUMENTS.

Circumstances Determining Genuineness. See BOUNDARIES.

MORTGAGES.

TITLE TO CROPS GROWING AT DATE OF FORECLOSURE SALE.

Where the mortgagor of land gives a chattel mortgage on his interest in the growing crop prior to a foreclosure sale of the land, but the crops are not cut till after the foreclosure sale, the title to the crops passes to the purchaser at such sale, since, until there was an actual severance, the crops pass with the title to the soil: *Jones v. Adams*, 473.

MULTIFARIOUSNESS.

For a Review of Multifariousness, see PLEADING, 2.

NATURALIZATION.

Effect of on Previous Disability to Inherit. See ALIENS, 1.

NAVIGABLE WATERS.

FLOATABLE STREAMS ARE NAVIGABLE.

A stream capable of floating logs and timbers to market is a navigable stream, and is not deprived of its navigable character by the fact that for a portion of the year it cannot be used for that purpose: *Hallock v. Sutor*, 8.

NEGLIGENCE.

OVERFLOWED SEWER—COMPETENT EVIDENCE OF NEGLIGENCE.

1. In an action for damages arising from alleged negligence in failing to exercise due care in keeping the intake of a creek sewer open and free, evidence of the construction of a drift dam above such intake, and the accumulation of logs and debris above such dam, which, being relieved, floated down and obstructed the sewer, was competent on the question of the exercise of due care, after proof that the defendant had been warned of the danger: *Chan Sing v. Portland*, 68.

INJURY TO PASSENGER—TIME TO ALIGHT.

2. Where plaintiff testified that a train stopped fifteen seconds, and started suddenly before she had time to get off, the court cannot hold, as a matter of law, that she was negligent in not alighting in that time: *Smitson v. Southern Pacific Company*, 74.

NEGLIGENCE OF COUNTY—ICE ON HIGHWAY.

3. An icy road ran down a steep hill along a gulch, making a sharp turn out around a point of rock near the bottom. As plaintiff was driving down the road with a heavy load, his horses slid on the ice, but were kept on the road as far as the turn, where they were precipitated into the gulch with their load. Held, in an action against the county, that the question whether a negligent construction and maintenance of the road was the proximate cause of the damage should have gone to the jury: *Gardner v. Wasco County*, 392.

CONTRIBUTORY NEGLIGENCE—ICY HIGHWAY.

4. An icy road ran down a steep hill along a gulch, making a sharp turn about fifty rods from the bottom. As plaintiff, who knew its condition, was driving down the roadway with a heavy load, his horses slid on the ice, and were precipitated into the gulch with the load. His harness had no breeching, and his horses were unshod. Held, that the question whether plaintiff was guilty of contributory negligence should have been submitted to the jury, since it was incumbent on him to exercise only that degree of care commensurate with the danger: *Gardner v. Wasco County*, 392.

NEGLIGENCE IN STARTING FIRE—EVIDENCE OF USUAL WINDS.

5. In an action to recover damages resulting from a fire caused by dropping from an engine in a stubblefield ashes and coals the fire in which the defendants

negligently failed to extinguish, it is proper to permit a witness who had lived in the country many years, and was familiar with climatic conditions, to testify as to the likelihood of a wind on the evening of a day such as that on which the fire causing the damage occurred; the likelihood of a wind arising being a material element in the question of defendant's negligence, as they had lived there many years and must have been familiar with local climatic conditions: *Lieuallen v. Mosgrove*, 448.

NONSUIT—SUFFICIENCY OF EVIDENCE OF NEGLIGENCE.

6. Defendants were operating a threshing machine run by a straw-burning engine, the method of removing ashes from which was by a trapdoor in the bottom of the ash pan, swung so that by tipping it the ashes would be dumped on the ground. Defendants were threshing in a field adjoining plaintiff's, on a windless day, and dumped ashes from the engine several times. Towards evening a wind arose, and a fire started near where the engine had stood, was communicated to stubble and inflammable material, and swept across plaintiff's field, causing him damage. An examination of the ashes on that evening disclosed live embers therein. *Held*, that the evidence presented a question of fact for the jury as to defendants' negligence in not extinguishing the fire, and that the overruling of a motion for a nonsuit was proper: *Lieuallen v. Mosgrove*, 448.

NEGLIGENCE IN STARTING FIRE—INSTRUCTION AS TO LIABILITY.

7. In an action for negligence in dumping ashes from an engine in a field adjoining plaintiff's, and failing to extinguish the fire in such ashes, an instruction that a person who negligently sets or keeps fire on his own land, or permits its escape therefrom, is liable, whether he might reasonably have anticipated the particular manner of its communication or not, and that in determining the question of diligence the jury could consider the dryness or dampness of the atmosphere and earth, the time of year, the likelihood of wind arising, and its probable direction and strength, is not objectionable, as seeking to charge defendants with the consequences of any extraordinary wind which might occur, but fairly presents the rule that, under such circumstances, defendants would be liable for the results of an ordinary and probable wind: *Lieuallen v. Mosgrove*, 448.

FALLEN ELECTRIC WIRE—REASONABLE CARE—QUESTION FOR JURY.

8. In an action for injuries occasioned by a live electric wire which had been blown down in a storm, an instruction that the defendant company could not excuse a delay in replacing such wire on the ground that they did not have a sufficient force to replace it sooner was erroneous, since the question whether the company exercised reasonable care was for the jury: *Boyd v. Portland Electric Company*, 567.

CONTRIBUTORY NEGLIGENCE—OVERFLOWING LAND.

9. Though the plaintiff, by her method of irrigation, caused surface water to accumulate on her low land, she could nevertheless recover against another for discharging quantities of water thereon and increasing her injury: *Emison v. Owyhee Ditch Company*, 577.

NEGOTIABLE INSTRUMENTS. Same as BILLS AND NOTES.

NEWLY DISCOVERED EVIDENCE.

Setting Aside or Disregarding Judgments for Errors of Fact. See JUDGTS., 6.

NEWSPAPER.

Partnership to Publish a Newspaper is Nontrading. See PARTNERSHIP, 1.

NONSUIT.

Lack of Leave to Sue on Bond of Public Officer. See TRIAL, 4.

Carriers—Injury to Passenger—Sufficiency of Evidence. See CARRIERS, 1.

Sufficiency of Evidence is a Question for the Jury. See TRIAL, 5, 6.

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NONTRADING PARTNERSHIP.

Partnership to Publish a Newspaper is Nontrading. See PARTNERSHIP, 1.

Limit of Power of Partner to Bind the Firm. See PARTNERSHIP, 2.

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NOTICE.

Facts Amounting to Knowledge—Bona Fides. See **BILLS AND NOTES**, 1, 2.

CIRCUMSTANCES EQUIVALENT TO NOTICE—BONA FIDE PURCHASER.

In a contest between opposing claimants under a judgment and an unrecorded deed an instruction that "the notice that will render a party a lienholder in bad faith must be something more than would excite the suspicion of a cautious and wary person. It must be so clear and undoubted, with respect to the existence of a prior right, as to make it fraudulent in him afterwards to take and hold the property,"—is correct: *Crossen v. Oliver*, 514.

NOTICE OF APPEAL.

Adverse Parties—Necessity of Serving Notice. See **APPEAL**, 1, 2, 3.

NUISANCE.

NUISANCE BY BACKING WATER ON UPPER PROPRIETOR.

1. A dam across a nonnavigable stream, whereby debris from the mines of an upper proprietor is arrested, does not constitute a private nuisance, entitling the upper proprietor to abate it, unless the dam backs the water on the upper proprietor's premises, causing him such injury that he can maintain an action therefor: *Turner v. Locy*, 158.

RIGHT OF INJURED PARTY TO ABATE NUISANCE.

2. While it is a general rule that a person may, after notice, abate a private nuisance, exercising due care, whenever he might maintain an action for the injury caused thereby, yet he cannot so abate the nuisance unless he will suffer some damage—even though nominal only—from its continuance: *Turner v. Locy*, 158.

NUNC PRO TUNC.

Power to Enter Such Judgment or Order. See **COURTS**, 4.

OBJECTION NOT MADE AT TRIAL.

Consideration of Such Objections by Appellate Courts. See **APPEAL**, 14, 15.

OBLIGATION OF CONTRACTS.

Preference of Unsecured Over Contract Claims. See **CORPORATIONS**.

OFFICERS.

SALARIES AND APPOINTMENT OF DEPUTY SHERIFFS.

1. The sheriffs of the several counties have under the act of 1895 (*Laws*, 1895, p. 77, §§ 4 and 5), power respectively to appoint the number of deputies provided for in that act, who shall be respectively entitled to the salaries there named, but other deputies must be appointed and their compensation fixed by the county courts under section 11 of said act: *Henry v. Yamhill County*, 562.

CLAIM FOR SALARY IS A PERSONAL RIGHT.

2. The claim of a deputy sheriff for the salary allowed him by law is a personal right, to be enforced in his own name, and not by his superior, unless the claim has been assigned: *Henry v. Yamhill County*, 562.

OFFICIAL FEES.

District Attorney of Multnomah County. See **DISTRICT ATTORNEYS**, 2.

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On Questions Not Requiring Peculiar Knowledge. See **EVIDENCE**, 10.

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PAROL LICENSE.

Passive Acquiescence Does Not Amount to a License. See LICENSE, 1, 2, 3.

Revocability of License Without Consideration. See LICENSE, 1, 2.

PARTIES.

EQUITABLE DISTRIBUTION OF FUND IN COURT.

Where a court of equity has a fund on hand for distribution it will insist on every party being in court who has any interest in or lien upon the fund: *Wheeler v. Lack*, 288.

PARTITION.

REMEDY FOR CONFUSED ADVANCEMENTS.

Where advancements had been made to some heirs, and others without knowledge of that fact had partitioned part of the residue of the real property with those who had received advancements, and finally the wife died leaving her dower undistributed, nothing but a partition suit will do justice to the situation and the parties: *Belle v. Brown*, 588.

PARTNERSHIP.

NONTRADING PARTNERSHIP.

1. A partnership to publish a newspaper is a nontrading partnership: *McManus v. Smith*, 222.

IMPLIED AUTHORITY OF PARTNER IN NONTRADING FIRM.

2. A member of a nontrading partnership has no implied authority to give a note in the firm name in a transaction outside of the apparent and actual scope of the partnership business, and persons dealing with such a firm in such matters must affirmatively show the authority of the partner with whom they dealt: *McManus v. Smith*, 222.

3. Where a partnership is formed to publish a newspaper, a note and chattel mortgage covering all the property of the firm, made by one partner without special authority from the other, are void, such acts not being within the implied authority of a partner in a nontrading partnership: *McManus v. Smith*, 222.

DISSOLUTION—PAYMENT OF PERSONAL DEBTS.

4. In closing up a partnership the court should not direct the payment of a personal debt of one of the partners out of the fund arising from the sale of the partnership property; but where it was mutually agreed between partners that the net profits of their business should be forthwith applied to the payment of a firm debt not yet due, the receiver should be directed to pay it out of the funds arising from the sale of the partnership property: *McManus v. Smith*, 222.

DISSOLUTION—APPOINTMENT OF RECEIVER.

5. In a suit for the dissolution of a partnership it is proper to appoint a receiver, if necessary to protect the property involved, or if the members of the firm cannot agree on an adjustment: *Fleming v. Carson*, 252.

DISSOLUTION—PROPRIETY OF SELLING PARTNERSHIP PROPERTY.

6. In a suit for an accounting and winding up of a partnership, it was proper for the court to direct a receiver to sell the partnership property in order to finally adjust the firm's affairs: *Fleming v. Carson*, 252.

DISSOLUTION—APPORTIONMENT OF COSTS.

7. In a suit to dissolve a partnership the court expenses would ordinarily be chargeable against the assets, unless one partner was at fault so that he should be charged with costs as a punishment: *Fleming v. Carson*, 252.

AGREEMENT NOT CONSTITUTING A PARTNERSHIP.

8. An agreement between two persons to divide commissions in case either should furnish to the other any customers to whom sales of property should be made, without any provision for dividing losses or expenses, does not constitute a partnership: *Wheeler v. Lack*, 238.

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Statute of Frauds—Sufficient Allegation of Performance. See SPEC. PERF. 2.
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PASSENGERS.

Injury to Passenger Alighting From Train—Notice by Brakeman—Instructions to Jury—Evidence. See CARRIERS.

PAYMENT.

PROVING PAYMENT WITHOUT HAVING SPECIALLY PLEADED IT.

Where there is an allegation of an amount due, and a denial thereof, payment may be shown without having been specially pleaded as a defense: *Robertson v. Robertson*, 339.

PECUNIARY RELIEF.

Equity Jurisdiction over Fund—Necessary Parties. See EQUITY, 4.

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Future Physical Pain is an Element of Damage. See **DAMAGES**, 3.

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Right to Deposit Tailings on Ground of Lower Owner. See **MINES**, 3.

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PLEADING.**SHAM PLEADING.**

1. Matter that is not obviously false or evidently pleaded in bad faith is not sham: *Miser v. O'Shea*, 231.

NECESSITY FOR PLEADING SPECIAL DAMAGES.

2. It is always necessary to specially plead those damages that may result, or have already been caused, by the act complained of, if they are to be considered: *Dose v. Toose*, 13; *Salzgeber v. Mickel*, 216.

MULTIFARIOUSNESS.

3. The subject of multifariousness in pleading is reviewed, and the conclusion reached that much must be left to the discretion of the court to determine whether a bill is multifarious, arising from a misjoinder of defendants therein. Thus, a bill to cancel several duebills alleged to have been fraudulently procured from plaintiff by one of the defendants, and then transferred to other of the defendants severally, is not multifarious, though some of the defendants may be put to additional expense in trying the case away from their home county: *Benson v. Keller*, 120.

ALTERNATIVE PLEADING—MOTION.

4. It is always bad pleading to state facts hypothetically, alternatively or conditionally, though the authorities are not uniform as to the proper motion to correct the fault: *Emison v. Owyhee Ditch Company*, 577.

HAPPENING OF CONDITION.

5. Where a right of action depends upon a contingency, the fact in relation thereto must be stated so that it will appear whether the plaintiff has or has not any cause for complaint; thus, where the owner of lands was to convey an interest therein for services to be rendered by plaintiff, and the contract provided that the owner might sell the claim before the expiration of the work, a complaint for specific performance must show when the land was sold: *Herron v. Bagle Mining Company*, 155.

COMPLAINT FOR ERECTION.

6. A complaint in an action by a tenant against his landlord for being wrongfully evicted from rented lands, which states that under the lease the landlord had a right to terminate the occupation on notice whenever he desired to use the lands for such purpose other than that for which they had been rented; that the

landlord gave such notice, and that the tenant peaceably surrendered possession in consequence thereof; that the said notice was given in bad faith and for the purpose of evicting plaintiff, and that the landlord had continued to use the lands for the same purpose for which they had been rented, states a cause of action for wrongful eviction as against a motion for judgment on the pleadings at the trial: *Salzgeber v. Mickel*, 216.

COMPLAINT—NEGLIGENCE OF ATTORNEY.

7. A complaint alleging that defendants, a firm of attorneys, contracted with plaintiff to examine the title to certain land; that they so carelessly performed their duty that they failed to discover the existence of a judgment lien against the land; that afterwards, on discovering its existence, they fraudulently concealed it from plaintiff's knowledge, but permitted her to make the purchase, relying on their previous representations; that they then bought the judgment themselves, transferring it in trust to a third party, and compelled her finally to purchase it from him; states a cause of action for negligence in performing a duty which they, as attorneys, owed to their client, rather than a cause of action for breach of the contract of employment: *Currey v. Butcher*, 330.

COMPLAINT—DAMAGES FOR ABUSE OF PROCESS.

8. In an action to recover damages for wrongfully suing out an injunction, malice and want of probable cause must be alleged and proved: *Hess v. German Baking Company*, 297.

CONSTRUCTION OF PLEADINGS—EQUITY JURISDICTION.

9. Under the general rule that pleadings should be liberally construed to the accomplishment of substantial justice, *held*, that the complaint in this case was based on the theory that the land in question had been mortgaged by an instrument in the form of a deed, and that the suit was to determine that question, which is a proper subject of equity: *Wollenberg v. Minard*, 621.

SPECIFIC PERFORMANCE—ALLEGATION OF PART PERFORMANCE.

10. In a suit for specific performance of a contract to convey land, a complaint alleging that defendant agreed with complainant that if she would put improvements on a part of his farm and reside there, he would convey such portion to her, and that in pursuance of such agreement she caused improvements to be made on the portion surrendered, is sufficient after decree, as it may then fairly be inferred that she went into possession under the agreement: *Barrett v. Schleich*, 613.

ANSWER—ALLEGATION ON INFORMATION AND BELIEF.

11. Under Section 72, Hill's Ann. Laws, requiring an answer to contain a specific denial of each material allegation controverted, or any knowledge or information thereof sufficient to form a belief, an answer not denying a certain allegation of the complaint, but averring that defendant has no knowledge or information sufficient to form a belief in regard thereto, does not raise any issue, and does not put the plaintiff upon proof of such allegation: *Law Trust Society v. Hogue*, 544.

RULE OF PLEADING NUL TIEL CORPORATION.

12. A defendant attempting to plead *nul tiel* corporation in abatement will be held to the technical rules governing such a plea: *Law Trust Soc. v. Hogue*, 544.

ANSWER—PLEA IN BAR.

13. A plea of *nul tiel* corporation goes to the merits, and is a plea in bar, and hence defendant did not waive such plea by joining it with a plea to the merits. Per Moore, J.: *Law Trust Society v. Hogue*, at p. 553.

ANSWER—PLEADING PAYMENT.

14. It is a general rule that payment must be pleaded to be available as a defense, but sometimes the form of the complaint renders this impracticable; thus, where there is an allegation of an amount due, and a denial thereof, payment may be shown without having been specially pleaded: *Robertson v. Robertson*, 339.

ANSWER—COUNTERCLAIM.

15. Plaintiff brought an action for damages, and to enjoin defendants, who owned a placer mine just above plaintiff's, on the same creek, from flooding debris down on plaintiff's claim in the operation of defendants' mine. Defendants filed a counterclaim for damages occasioned by water being backed up on their claim in consequence of a dam built across the creek below defendants' mine by plaintiff. *Held*, that the counterclaim was properly struck out since such damages were in no way connected with the subject of the suit, as required by Section 393, Hill's Ann. Laws, but arose from an independent trespass; *Miser v. O'Shea*, 231.

TRESPASS AS A COUNTERCLAIM.

16. A trespass cannot be pleaded as a counterclaim to or as a set-off against another trespass: *Miser v. O'Shea*, 231.

SCOPE OF DEMURRER TO ONE OF SEVERAL CAUSES OF SUIT.

17. Where a demurrer is specifically directed to one of several causes of action and the others are substantially the same as the second, the demurrer will be considered as if it went to the entire cross bill: *Hughes v. Pratt*, 45.

AMENDING PLEADINGS AFTER REVERSAL.

18. Pleadings may be amended at any time before trial, even to the extent of adding new causes of action or defense if connected with the subject-matter of the controversy, without regard to previous appeals or reversals, and the action of the trial court on applications to amend will not be reviewed except for a plain abuse of discretion resulting in a material injury to some substantial right of the appellant: *Lieuallen v. Mosgrove*, 446.

CHANGING CAUSE OF ACTION.

19. An amendment to a complaint for damages by fire caused by defendants' negligence, which charges negligence, not only in depositing ashes and live coals at a place from which fire would be liable to communicate to inflammable material, but also in not exercising requisite care in attending to and extinguishing the fire after it had been deposited on the ground, is germane to the controversy, and may properly be allowed by the trial court, even after reversal on appeal: *Lieuallen v. Mosgrove*, 446.

AIDER OF DEFECTIVE COMPLAINT BY VERDICT.

20. A defect in complaint for damages arising from a neglect of duty, that it does not allege a specific negligent act done or a duty negligently omitted is waived by answering and is cured by a verdict for the plaintiff: *Chan Sing v. Portland*, 68.

DEFECTIVE COMPLAINT CURED BY VERDICT—WAIVER.

21. An incomplete statement of a cause of action is cured by the verdict where the issue of fact involved was made by the answer and reply, and was fully tried on the testimony without objection: *Roseburg Railway Co. v. Nisler*, 299.

SUFFICIENCY OF PLEADING—DEFECTS CURED BY VERDICT.

22. In an action against a firm of attorneys for negligence in examining a title, objections to the introduction of evidence on the ground that the complaint did not set forth a cause of action because it did not describe the land; because it did not state that an execution could legally issue on the judgment alleged to have been a lien, and not reported; because it did not allege that the judgment debtors were insolvent; and because it did not appear that the judgment antedated the decree in the foreclosure suit brought by plaintiff's vendor against his judgment debtor, were properly overruled, such objections being merely technical, and going to an imperfect statement of a cause of action rather than a failure to state a cause. Such objections are cured by verdict, all intentions being in favor of the pleading when attacked during the trial: *Currey v. Butcher*, 380.

23. Where both parties to a suit involving the right to a ditch based their claims on adverse rights, and neither alleged an appropriation of the water as the foundation of his claim, but the trial was had on the theory that defendant's grantor had appropriated the water and conveyed it as appurtenant to the land, and on appeal a decision was made, based on the theory of an appropriation of the water by plaintiff's grantor, it was too late for defendant to urge, on petition for rehearing, that the complaint did not allege any such appropriation by plaintiff's grantor; the case having been tried through by both sides on the theory of an appropriation, neither party will now be heard to claim otherwise: *Mattis v. Hosmer*, 523.

24. Where defendant, in his answer in an action by an alleged corporation, admitted the execution of the contract sued on, but raised the question of plaintiff's corporate existence, only, by averring lack of knowledge or information sufficient to form a belief, the estoppel of defendant's right to deny the corporate existence created by his admission of the contract, if any, was waived by failure to demur to the answer. Per MOORE, J.: *Law Trust Society v. Hogue*, 544.

QUIETING TITLE—WAIVING OBJECTION TO JURISDICTION.

25. In suits to determine adverse interests to realty the objection to the jurisdiction because the defendant is in possession must be taken by a proper plea, or it will not be considered; particularly is this true where the defendant asks affirmative equitable relief: *State v. Blize*, 404.

PLEADING AND PROOF MUST CORRESPOND.

26. Recoveries in legal proceedings must be had, if at all, on the grounds stated

in the pleadings; a party will not be permitted to recover on a claim or theory that has not been pleaded. Thus, where neither the complaint nor the answer alleged an intention of the parties that a deed and bill of sale sought to be set aside and canceled should be considered as mortgages, but the complaint was predicated on the theory of mental incapacity to execute and failure to deliver the deed, a recovery cannot be claimed on the mortgage theory: *Swank v. Swank*, 439.

For questions of pleading in particular actions or proceedings, see the desired subject.

PLEA IN ABATEMENT.

Rule in Pleading *Nul Tiet* Corporation—Joining Such a Plea with a Plea to the Merits. *Law Trust Society v. Hogue*, pp. 553 and 554.

POLITICAL QUESTION.

Whether Road Should be Opened. See STATES, 1.

Method of Determining Proper Location. See STATES, 2.

POSSESSION.

Suit to Quiet Title—Sufficiency of Possession. See ADV. POSS. 2.

Acts not Amounting to an Ouster. See ADV. POSS. 3.

Conduct Showing Adverse Possession. See ADV. POSS. 4.

POSTPONEMENTS.

Continuing Trial—Admission as to Testimony of Absent Witness if Present—Discretion. See CONTINUANCE.

POWER OF COURT.

Power to Enter Order *Nunc pro Tunc*. See COURTS, 4.

Modifying Consent Separation Decree. See COURTS, 2, 3.

PREFERENCES.

Preference Between Unsecured and Contract Creditors. See CORP.

PRESUMPTIONS.

As to Verity of Transcript on Appeal. See APPEAL, 7.

As to Existence of Marriage—Cohabitation. See EVIDENCE, 1.

As to Delivery of Deed From Its Possession. See DEEDS, 2.

As to Date of Delivery of Deed. See DEEDS, 5.

PRINCIPAL AND AGENT.

NECESSARY CONDITION OF RATIFICATION.

1. Before there can be a ratification there must have been something done on behalf of or in the name of the person ratifying: *Ladd v. Chamber of Com.* 49.

COMPETENCY OF STATEMENTS BY ALLEGED AGENT.

2. In a suit to enjoin the appropriation of water from a creek, testimony that a third party, who lived with plaintiff, made statements recognizing defendant's right to exclusive use of the water, and that at his request defendant permitted plaintiff to use the water for purposes of irrigation, was not admissible as against plaintiff, there being no proof of a general agency: *Mattis v. Hosmer*, 523.

PRINCIPAL AND SURETY.

CONTRIBUTION BETWEEN COSURETIES.

1. Where some of the sureties on a bond borrow money on their personal credit and use it to prevent a breach of the bond by the principal, other sureties who did not join in such proceeding cannot be compelled to contribute to the repayment of the money so borrowed. Each surety is bound by the original contract, and is entitled to determine for himself the course to be pursued in case of a threatened breach of the bond: *Ladd v. Chamber of Commerce*, 49.

CHANGING RELATION OF COSURETIES BETWEEN THEMSELVES.

2. The fact that the owner of a building in course of erection who holds a bond executed by several persons to secure its erection and completion, gives to the sureties the charge of the construction and control of the funds provided therefor, does not change the relation of the sureties as between themselves so that a part of them can contract obligations binding on all: *Ladd v. Chamber of Commerce*, 49.

3. The relation between the sureties on a bond given to secure the erection of a building and its delivery free of liens, is not changed either with reference to the principal nor with reference to each other, by the fact that the sureties are given charge of the work and the disbursements of the funds provided to pay for it: *Ladd v. Chamber of Commerce*, 49.

CONTRIBUTION—PAYMENT BY COSURETY.

4. A surety cannot, except under peculiar circumstances, maintain a suit for contribution against a cosurety until he has paid the obligations to which the cosurety is asked to contribute: *Ladd v. Chamber of Commerce*, 49.

SURETY—ENFORCEMENT OF CONTRIBUTION.

5. Though a surety may in some instances, without payment, compel a co-obligor to pay his portion of a common obligation, yet that remedy is not available where the person to whom payment should be made is not a party to the suit, and the person seeking contribution has not paid more than his share of the obligation: *Ladd v. Chamber of Commerce*, 49.

PRIORITIES

Between Judgment Creditor and Holder of Unrecorded Deed. See JUDGMENTS, 14.

Between Corporate Secured and Unsecured Creditors. See CORPORATIONS.

PRIVATE NUISANCE.

Right of Abatement in Injured Party. See NUISANCE, 2.

PROBABLE CAUSE

Must be Proved in Actions for Malicious Suing. See MALICIOUS PROS.

PROCESS. See, also, JUSTICES OF THE PEACE.

SERVICE OF SUMMONS—SUFFICIENCY OF RETURN.

1. A return of service of a summons showing that it was served on minors by delivering to each of them a true and correct copy thereof is insufficient under Hill's Ann. Laws, § 55, subd. 3, requiring a summons to be served by delivering a copy thereof to the minor "personally," since such return does not show personal delivery by the officer; hence the court acquired no jurisdiction of the persons of such minors by such service: *Harris v. Sargeant*, 41.

SERVICE OF PROCESS PERSONALLY.

2. In a statute requiring a sheriff to execute a process to delivering a copy of the writ to the defendant "personally," the prepositional phrase "personally" refers to the sheriff, and required that the officer must himself hand the paper to the minor, and cannot do it through some other person; thus, a certificate by the officer that he delivered "to each of said defendants a true copy of said summons" is not a certificate that he himself delivered it to the defendant: *Harris v. Sargeant*, 41.

ABUSE OF PROCESS—MALICE—PROBABLE CAUSE.

3. In an action to recover damages for wrongfully suing out an injunction, malice and want of probable cause must be alleged and proved: *Hens v. German Baking Co.*, 27.

PROMISSORY NOTES. Same as BILLS AND NOTES.

PROPERTY.

Nature of Interest of Locator of Mine Before Patent. See MINES, 4.

PROSECUTING ATTORNEYS. Same as DISTRICT ATTORNEYS.

PROVINCE OF COURT AND JURY.

Presenting Theories of the Respective Parties is Proper. See TRIAL, 12.

PUBLIC LANDS.

WHEN ESTATES BECAME VESTED UNDER THE DONATION ACT.

1. Under the Donation Land Law (act Cong. 27 Sept. 1850), a settler on the public domain did not acquire in the land which he claimed any estate, but only a right of possession, until he had completed the residence and cultivation required by law, and of course his wife could not have any greater estate than he had: *Quinn v. Ladd*, 261.

TIMBER CULTURE CLAIM—VALIDITY OF CONTRACT TO SELL.

2. 20 U. S. Stat. 118, § 2, governing timber culture claims, and providing that a person applying for the benefit of the act shall make affidavit that the entry is for the cultivation of timber for his exclusive use, and on final proof shall show that he has planted a certain number of trees, and cultivated and protected them for a certain time, does not inhibit the claimant, who has made entry in good faith, from contracting before final proof to sell his claim: *Church v. Adams*, 355.

SUFFICIENCY OF EVIDENCE—PUBLIC LANDS.

3. Where, in an action to enjoin interference with plaintiff's water right there was uncontradicted evidence that plaintiff's grantor was operating a placer mine on public land in 1868, at the head of the ditch in question, and was using the water therefrom, and in 1878 made a homestead entry on such land, and in 1878 made final proof of settlement and cultivation, it was sufficient to justify a finding that the land was government land at the time of the appropriation of water by plaintiff's grantor: *Mallis v. Hosmer*, 523.

PUBLIC POLICY.**HUSBAND AND WIFE—SEPARATION AGREEMENT NOT ALWAYS VOID.**

A contract by which a husband agrees to pay certain moneys to his wife for her support for a stated period, not made for the purpose of securing a separation, but in contemplation of a divorce on account of the misconduct or disability of the husband, and without fault or inducement by the wife, is not void on grounds of public policy: *Henderson v. Henderson*, 141; *Ogilvie v. Ogilvie*, 171.

PUBLIC ROADS. Same as HIGHWAYS.**QUESTION FOR JURY.****QUIETING TITLE.****QUIETING TITLE—WAIVING OBJECTION TO JURISDICTION.**

1. In suits to determine adverse interests to realty the objection to the jurisdiction because the defendant is in possession must be taken by a proper plea, or it will not be considered; particularly is this true where the defendant asks affirmative equitable relief: *State v. Blize*, 404.

REMOVING CLOUD—ENJOINING SALE ON VOID TAX WARRANT.

2. Under the general power to prevent clouds on titles and to quiet-adverse claims to realty equity will restrain a threatened sale of land on a void tax process: *Hughes v. Linn County*, 111.

RAILROADS.**PAROL EVIDENCE TO EXPLAIN COMMON WORDS.**

1. Where a deed to a railroad company conveyed land "for all legitimate railroad, depot, and warehouse purposes," parol evidence of the understanding of the parties at the time the instrument was executed is not admissible to show that the words "legitimate railroad purposes" were used with a particular or special meaning. Being ordinary and usual words, no peculiar signification can be attached to them by parol evidence: *Abraham v. Oregon & California Railroad Company*, 495.

RAILROAD PURPOSES—HOTEL AND EATING HOUSE.

2. A railroad company may under some circumstances conduct hotels or eating houses in connection with and as a necessary part of its railroad business, and their maintenance would be a legitimate railroad purpose; but whether a certain hotel or eating house is maintained for such purpose is a mixed question of law and fact that ordinarily requires testimony for its determination: *Abraham v. Oregon & California Railroad Company*, 495.

CONSTRUCTION OF RAILROAD SUBSIDY CONTRACT.

3. In construing a subsidy contract conditioned on construction of a railroad within a specified time, unless the delay was caused by procuring rights of way, collections of subsidy, "or other just cause," delays in construction caused by rainy and inclement weather are not a sufficient excuse for nonperformance within the stipulated time, since the term "other just cause" means delays by reason of defendant's acts, or of the law, or by an act of God, and not those caused by ordinary inclement weather, which the parties must have anticipated: *Roseburg Railway Company v. Nosler*, 289.

Injuries to Passengers. See CARRIERS.

RAILROAD SUBSIDY CONTRACT.

Construction of Subsidy Agreement—Causes of Delay—Inclement Weather—Time of Performance. See **RAILROADS**, 3.

RATIFICATION. See **PRINCIPAL AND AGENT**, 1.

REAL PROPERTY.

Interest of Locator of Mining Claim Before Patent. See **MINES**, 4.

RECEIVERS.**SUBROGATION—RECEIVERS—EQUITY.**

1. A creditor who seeks to reach property in the hands of a receiver and have it applied to the payment of his claim should proceed in the receivership suit by petition, and not by an original suit in equity: *Goodnough v. Gatch*, 5.

ACCOUNTING BY RECEIVERS—RIGHT TO APPEAL.

2. A receiver may appeal from an order of the court directing him to pay over money in his hands, when such order erroneously fixes the amount in his possession, and directs him to turn over more than he has in his custody: *Merriam v. Victory Mining Company*, 321.

DISSOLUTION OF PARTNERSHIP—RECEIVER.

3. In a suit for the dissolution of a partnership it is proper to appoint a receiver, if necessary to protect the property involved, or if the members of the firm cannot agree on an adjustment: *Fleming v. Carson*, 252.

RECEIVERS—DISCHARGE—LACHES.

4. One of the defendants in a suit to foreclose a mortgage was injuriously affected by a decree which was entered on an erroneous mandate from the appellate court. She neglected, however, to apply to the supreme court for correction of the mandate for ten months after the receiver had been directed to distribute the rents and profits in his hands, and for eight months after confirmation of the sale under the decree. After the decree had been corrected, she applied for an order vacating the distribution of rents formerly made by the receiver and for a redistribution, and for an order directing the receiver to place her in possession. *Held*, that the motion was properly denied on the ground of her laches; the former order directing payment by the receiver having been acquiesced in by her for nearly a year, during which the receiver had distributed the funds in accordance with the order of the court, and another party had taken peaceable possession: *Lombard v. Wade*, 428.

INFORMAL ORDER DISCHARGING RECEIVER.

5. Where an order was made in a foreclosure suit confirming the receiver's report, and directing him to make certain payments of the funds in his hands, taking vouchers therefor, and that on filing such vouchers he be discharged, and the receiver made such payments, except to one party, who refused to accept her share, and, with the acquiescence of all parties, ceased to collect rents from the premises or to exercise any control over them, such order, though informal, will operate as a discharge of the receiver: *Lombard v. Wade*, 428.

RECEIVER FOR CORPORATION—PREFERRED CLAIMS.

6. The right of the court appointing a receiver for a corporation to give priority of payment to unsecured debts over the lien of prior mortgage bonds is restricted to creditors of railroads, which are public concerns, and cannot be exercised to give unsecured creditors of an ordinary corporation such preference over contract liens: *Merriam v. Victory Mining Company*, 321.

RECITALS.

Effect and Conclusiveness of In Court Orders. See **JUDGMENTS**, 1.

RECORDS.**RIGHT TO AMEND BY NUNC PRO TUNC ORDER.**

Where a court made an order and directed it to be entered *nunc pro tunc* as of an earlier date, there being nothing to show that it was an order made at that time which by accident had not been entered, such order was beyond the authority of the court and void: *Lombard v. Wade*, 428.

REFEREE'S REPORT.

Force of Referee's Report on Appeal in Equity. See **APPEAL**, 30.

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When Memorandum is Competent. See EVIDENCE, 5, 6.

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Notes—Suit in Equity—Suretyship—Bona Fide Holder. See EQUITY, 1.
In Case of Scattered Property Obtained by Fraud. See EQUITY, 7.

REMOVAL OF CLOUD.

Jurisdiction of Equity to Prevent Sale on Void Process. See EQUITY, 3.

RENT.

When Rent is Usually Payable Under a Crop Lease. See LAND AND TEN, 4.

REPEAL of Statute by Implication. See STATUTES, 5.**REPRESENTATION**

Of Title—Ignorance—Inference of Fraud. See FRAUD, 3.

RESCISSION.

Necessity of Returning Consideration Received. See CONTRACTS, 14.

RES JUDICATA.

Collateral Attack on Completed Proceedings. See JUDGMENTS, 3, 4, 5.

RESTRAINT OF TRADE.

Elements of Damage in Case of Breach. See CONTRACTS, 5, 6.
Conduct not Constituting a Breach of Contract. See CONTRACTS, 7.

RETURN OF OFFICER.

Changed Return as Evidence. See EVIDENCE, 8.

REVIEW. Same as WRIT OF REVIEW.**REVISED STATUTES OF THE UNITED STATES.**

Section 2290 } Church v. Adams, 363, 364.
Section 2301 }
Section 2320 } Muldrick v. Brown, 185, 189.
Section 2448 } Quinn v. Ladd, 272.
Supp. p. 888, section 5, McBean v. McBean, 196, 206.
20 Stat. at Large, 113, Sec. 2: Church v. Adams, 355, 364.
24 Stat. at Large, 388, Sec. 5: McBean v. McBean, 207.

REVOCATION of Licenses. See LICENSE, 1, 2, 3.**ROADS. Same as HIGHWAYS.****SALES.****IMPLIED WARRANTY OF TITLE AS AFFECTED BY POSSESSION.**

1. Where personal property in the possession of the vendor is sold at a fair price, the law implies a warranty of title; but no such warranty is implied where a third person has possession: *Balle v. Bedemiller*, 27.

SALES—BREACH OF WARRANTY—ATTORNEY'S FEES AS DAMAGES.

2. A vendee who, after an unavailing notice to his vendor, unsuccessfully defends the title that has been warranted to him, is entitled to recover from the vendor as part of his damages the amount paid his attorneys for making such defense: *Balle v. Bedemiller*, 27.

SCHOOLS AND SCHOOL DISTRICTS.**ELECTIONS—DUTY OF CHALLENGED VOTER.**

Where a voter at a school election is challenged, he must furnish evidence to establish his right of suffrage if he insists on voting; for, since such elections are neither general nor special elections, the provisions of the statute making it the duty of judges of election at general or special elections to take active measures to determine the qualifications of challenged voters, are not applicable thereto: *Breding v. Williams*, 433.

SERVICE

Of Notice of Appeal—Who are Adverse Parties. See APPEAL, 1, 2, 3.

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SET-OFF AND COUNTERCLAIM.

Trespass as a Counterclaim to Another Trespass. See PLEADING, 16.

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Executing Chattel Mortgage on Crops not a Severance. See CROPS, 1.

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Damages Caused by Overflow of. See NEGLIGENCE, 1.

SHAM PLEADING Definition of. See PLEADING, 1.

SHERIFFS.

LIMITATION OF ACTION ON GENERAL BOND OF SHERIFF.

1. An action on the general bond of a sheriff is limited by Hill's Ann. Laws, § 7, subdv. 1, allowing an action within three years: *Multnomah County v. Kelly*, 1.

LIMITATION OF ACTION ON SPECIAL BOND OF SHERIFF.

2. An action on a sheriff's special bond as tax collector is controlled by Hill's Ann. Laws, § 6, subdv. 2, allowing six years to sue: *Multnomah County v. Kelly*, 1.

NATURE OF ACTION ON SHERIFF'S BOND AS TAX COLLECTOR.

3. An action on a sheriff's undertaking for the faithful performance of his duties as tax collector is based on a liability created by statute, and it is governed, in respect to the time of its commencement, by Hill's Ann. Laws, § 6, subd. 2, providing that an action on a liability created by statute shall be commenced within six years: *Multnomah County v. Kelly*, 1.

SALARIES AND APPOINTMENT OF DEPUTY SHERIFFS.

4. The sheriffs of the several counties have, under the act of 1895 (Laws, 1895, p. 77, §§ 4 and 5), power respectively to appoint the number of deputies provided for in that act, who shall be respectively entitled to the salaries there named, but other deputies must be appointed and their compensation fixed by the county courts under section 11 of said act: *Henry v. Yamhill County*, 562.

SPECIAL DAMAGES.

Such Must be Pleaded to be Recovered. See DAMAGES, 1.

SPECIFICATION OF ERRORS.

Errors Must be Assigned to be Considered. See APPEAL, 9.

SPECIFIC PERFORMANCE.

SPECIFIC PERFORMANCE OF PAROL CONTRACT—ORDER OF PROOF.

1. Under Hill's Ann. Laws, § 890, declaring that the order of proof shall be in the discretion of the court, in a suit for the specific performance of a parol contract to convey land, executed on complainant's part, the admission of evidence of the agreement before proof of complainant's performance was not error: *Barrett v. Schleich*, 618.

SPECIFIC PERFORMANCE—ALLEGATION OF PART PERFORMANCE.

2. In a suit for specific performance of a contract to convey land, a complaint alleging that defendant agreed with complainant that if she would put improvements on a part of his farm and reside there, he would convey such portion to her, and that in pursuance of such agreement she caused improvements to be made on the portion surrendered, is sufficient after decree, as it may then fairly be inferred that she went into possession under the agreement: *Barrett v. Schleich*, 618.

CONTRACT TO CONVEY—PART PERFORMANCE.

3. The amount of performance necessary to justify the enforcement of an oral contract to convey land must depend upon the condition and ability of the party claiming a specific enforcement, and in this case the part performance was sufficient: *Barrett v. Schleich*, 618.

CONSTRUCTION OF CONTRACT TO CONVEY.

4. Where the complaint in a suit for the specific performance of an oral contract to convey land alleged that complainant, in consideration of defendant's agreement to convey, agreed to reside on the land, to build a house and fences, and to cultivate the land, and no motion was made in the trial court to require the complainant to specify more definitely as to the term of residence and the character and extent of the improvements required by the agreement, failure to require such specific allegations authorized the court to construe the character of the improvements and the length of time as required by the word "reasonable," and, the evidence showing a reasonable compliance, a decree for complainant will not be disturbed: *Barrett v. Schleich*, 618.

STATE CONSTITUTION. Same as CONSTITUTION OF OREGON.

STATES.

NECESSITY FOR HIGHWAY—LEGISLATIVE QUESTION.

1. The allegation in a petition for a public road over private property that it is necessary, and that the property of the petitioners cannot be reached by any convenient highway, is not issuable, since the manner of its determination is a legislative question, and since the legislature has provided that the appearance of these facts in the petition shall be sufficient to authorize the court to appoint viewers to lay out the road: *Fanning v. Gilliland*, 369.

DAMAGES BY OPENING HIGHWAY—POLITICAL QUESTION.

2. The report of viewers appointed by the court to lay out a public road over private property that the road has been so laid as to cause the least damage is not issuable, since the question raised is political in its nature, and the procedure authorized by the legislature for its ascertainment makes provision for a hearing only on the ultimate question of compensation for the damage: *Fanning v. Gilliland*, 369.

CANCELING DEED TO STATE.

3. Where a state has purchased land, paying a fair price therefor, the grantor is not entitled to have the deed set aside on the ground that the state officials falsely and fraudulently represented that the state would build an insane asylum thereon, for the state has power to hold real property, and, having paid for this land, it may do as it pleases with it: *State v. Hize*, 404.

STATUTE OF FRAUDS.

Part Performance of Oral Contract to Convey. See SPECIFIC PERF. 3.

STATUTE OF LIMITATIONS. Same as LIMITATION OF ACTIONS.

STATUTES AND STATUTORY CONSTRUCTION.

OBJECTION OF WANT OF LEAVE TO SUE ON BOND OF PUBLIC OFFICIAL.

1. Section 342, Hill's Ann. Laws, providing that in certain cases leave must be had to sue on a bond of a public officer, and that "if it does not appear from the complaint that the leave therein provided for has been granted, the defendant on motion shall be entitled to judgment of nonsuit," is exclusive and provides

the only method of presenting that point; if that objection is not made by a motion for a nonsuit, it will not be considered on appeal, although section 71 provides that the objections of lack of jurisdiction and that the complaint does not state a cause of suit or action are never waived and may be first urged even on appeal: *Multnomah County v. Kelly*, 1.

NATURE OF ACTION ON SHERIFF'S TAX BOND.

2. An action on a sheriff's bond as a tax collector is one for the enforcement of a liability created by statute, within the meaning of Hill's Ann. Laws, § 6, subd. 2: *Multnomah County v. Kelly*, 1.

PENALTY FOR FAILURE OF WITNESS TO ATTEND—DAMAGES.

Under Hill's Ann. Laws, § 798, providing that a witness disobeying a subpoena duly served shall forfeit to the party requiring his attendance the sum of \$50 and all damages sustained, which forfeiture and damages may be recovered in an action at law, the payment to a witness of his fees and mileage is not sufficient to entitle the party requiring his attendance to recover the penalty for nonattendance, but it must be shown that the witness was material, and that damage other than the loss of such fees and mileage resulted from his nonattendance: *Lombard v. Smith*, 23.

CONSTRUCTION OF STATUTES FOR COLLECTING TAXES.

4. Proceedings for the collection of taxes are summary and *ex parte*, and it must affirmatively appear that all statutory requirements have been strictly complied with in order to authorize the sale of land thereunder: *Hughes v. Linn County*, 111.

DESCENT OF INDIAN LANDS—CONSTRUCTION OF STATUTE.

5. Supp. Rev. Stat. U. S. p. 898, § 5, relating to the legitimacy of Indian children, is general in its purpose, and does not repeal or in any way affect the special act of 1885, relating to the allotment of lands to the Umatilla Indians: *McBean v. McBean*, 195.

SELLING TIMBER CLAIM BEFORE PATENT.

6. The federal law governing the acquisition of timber culture claims, 20 U. S. Stat. 113, § 2, does not affect a contract to sell such a claim made before final proof by a claimant who in good faith made the entry: *Church v. Adams*, 355.

COUNTIES—KNOWLEDGE OF DEFECT IN HIGHWAY—WARNING.

7. Sess. Laws, 1898, p. 141, providing that parties having no knowledge of the defective condition of a highway may recover damages from the county for injuries caused thereby, merely expresses the common law, and must be interpreted by the rules there enforced as to exercising care corresponding to the danger: *Gardner v. Wasco County*, 392.

8. Under a statute providing that whenever a traveler on a county highway, without contributory negligence, and "not having been warned of the defect or danger by notice or otherwise," sustains any loss, damage or injury, he may recover damages, etc. The clause, "not having been warned of the defect or danger by notice or otherwise," refers to written or printed notice given when roads are found unsafe, and of otherwise warning travelers by means of barriers; and a knowledge of the defect is not equivalent to the warning referred to in such clause, and does not preclude recovery where the traveler used care proportionate to the danger.—*Gardner v. Wasco County*, 392.

VALIDITY OF ACTS DONE UNDER AN UNCONSTITUTIONAL LAW.

9. An act done in pursuance of a statute apparently legal must be considered, in a suit between the immediate parties, as having been lawfully done, though subsequently the statute is declared void: *State v. Blize*, 404.

ASSIGNING DOWER—STATUTORY CONSTRUCTION.

10. Section 2861 of Hill's Ann. Laws, investing county courts with power to admeasure dower, does not deprive equity courts of their long-established jurisdiction over that subject, since there are no words indicating such an intention: *Baer v. Ballingall*, 416.

NEGOTIABILITY OF WAREHOUSE RECEIPTS—INDORSEMENT.

11. A statute declaring that warehouse receipts shall be "negotiable, and may be transferred by indorsement of the party to whose order such receipt was given or issued, and such indorsement shall be deemed a valid transfer of the commodity represented by such receipt," makes such receipts negotiable, in the sense that a transfer thereof by indorsement carries the absolute title to the commodities represented by the receipts and protects bona fide purchasers for value from unknown equities between the original parties: *Anderson v. Portland Flouring Mills Company*, 483.

NEGOTIABILITY OF WAREHOUSE RECEIPTS—PAROL EVIDENCE.

12. Section 4205 of Hill's Ann. Laws, declaring that warehouse receipts shall be negotiable and transferable by indorsement, does not render such receipts negotiable, so as to render parol evidence inadmissible, in an action on such receipts, to show that the firm issuing the same was in fact acting as agent. In that respect such receipts are still simple contracts: *Anderson v. Portland Flour. Mills Co.* 483.

DISTRICT ATTORNEY'S FEES IN DIVORCE CASES—REPEAL BY IMPLICATION.

13. The requirement of Section 1074, Hill's Ann. Laws, that the plaintiff in every divorce suit shall pay a stated fee to the district attorney, is not affected by the acts of 1895 or 1899 relating to the fees of certain named officers, for neither the district attorney, his fees nor his duties are referred to therein: *State ex rel. v. Moore*, 536.

DISTRICT ATTORNEY'S FEES—IMPLIED REPEAL.

14. The act of 1888 placing the District Attorney of Multnomah County on a salary, and providing that the fees, percentages, commissions, and charges then established by law, or in any manner allowed for the performance of any act or duty required of that attorney, except services rendered for or on behalf of the state, or for or on behalf of Multnomah County, for which no charge shall be made, should continue and remain established fees; and that such officer should collect from the person or party for whom services should be rendered, or who might be charged with the payment thereof, did not repeal by implication Section 1074, Hill's Ann. Laws, as the exception in the act of 1888 as to services on behalf of the state was intended to apply to instances in which the district attorney had theretofore been authorized to charge and collect from the state, and not to cases where his fees were to be collected from private parties for whom the services are rendered, or who might have been charged with the payment thereof: *State ex rel. v. Moore*, 536.

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STIPULATION.

UNDERTAKING ON APPEAL—EFFECT OF STIPULATION.

On appeal from an order dismissing with costs a motion for modification of a decree granting a divorce and alimony, defendant gave a bond to the effect to satisfy the order appealed from so far as affirmed. About the same time a stipulation was filed providing that, in consideration that plaintiff would not file any counter bond, as provided by Hill's Ann. Laws, § 540, in order that she might enforce the decree for alimony pending the appeal, the defendant would pay her a certain sum per month until the appeal was determined, to be applied *pro tanto* in payment of any alimony to which plaintiff should be entitled on the final determination of the suit. *Held*, that the stipulation did not enlarge the scope of the appeal bond, so as to render the surety liable for alimony which accrued against defendant after the appeal was perfected: *Henderson v. Henderson*, 141.

SUBROGATION.

PRACTICE—ASSETS IN HANDS OF RECEIVER.

1. The proper practice for a creditor seeking to be subrogated to the rights of his debtor as to property in the hands of a receiver, is to intervene in the original suit, and not begin a separate proceeding in equity: *Goodnough v. Gatch*, 5.

SUBROGATION ON PAYING DEBT.

2. A minor having signed a note and mortgage with his mother, and having paid the debt after he became of age, and taken an assignment of the security, is entitled to be subrogated to his mother's rights and enforce the security: *Baer v. Ballingall*, 416.

SUBSIDY CONTRACT.

Railroad Construction Agreement—Nonperformance—Inclement Weather as Excusing Delay. See **CONTRACTS**, 8.

SUFFERING as an Element of Damages. See **DAMAGES**, 2, 3.

SUMMONS.

Sufficiency of Return of Personal Service. See **PROCESS**, 1.

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SURETYSHIP. Same as **PRINCIPAL AND SURETY**.

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Controlling Circumstances in Ascertaining Monuments. See **BOUNDARIES**.

TAXES AND TAXATION.

EQUITY—CLOUD—SALE ON VOID TAX PROCESS.

1. Under the general jurisdiction to prevent clouds on titles, equity will entertain a suit to restrain the sale of realty on a void tax process: *Hughes v. Linn County*, 111.

AFFIDAVIT ON DELINQUENT TAX ROLL—VOID WARRANT.

2. An affidavit of a sheriff attached to a statement of delinquent taxes, that such statement is correct, and that the taxes in such annexed delinquent list are unpaid, is not in compliance with Hill's Ann. Laws, §§ 2809, 2810, requiring the sheriff to return to the county court a statement of unpaid taxes, and section 2811 declaring that he shall annex thereto an affidavit that the facts set forth in such statement were correct, that the sums returned unpaid were not paid, and that on diligent inquiry he had been unable to discover goods or chattels of the persons charged therewith whereon to levy the same: *Hughes v. Linn County*, 111.

COLLECTION OF TAXES—AFFIDAVIT OF SHERIFF.

3. Under the laws of Oregon personal property is the primary fund to be resorted to for the compulsory payment of taxes, and the return of the sheriff on the tax roll is the only evidence to be considered in ascertaining whether the county court had authority to order the sale of realty for unpaid taxes: *Hughes v. Linn County*, 111.

COLLECTION OF TAXES—COMPLIANCE WITH STATUTES.

4. Proceedings for the collection of taxes are summary and *ex parte*, and it must affirmatively appear that all statutory requirements have been strictly complied with in order to authorize the sale of land thereunder: *Hughes v. Linn County*, 111.

OBJECT OF AFFIDAVIT TO DELINQUENT ROLL.

5. The object of requiring the affidavit described in Section 2811 of Hill's Ann. Laws to be attached to the return of unpaid taxes is to officially convey to the county clerk the information necessary to authorize the issuance of a warrant for the collection of the unpaid taxes from real property, and the warrant cannot legally be issued unless that affidavit accompanies the delinquent roll: *Hughes v. Linn County*, 111.

CONSTRUCTION OF ORDER TO COLLECT DELINQUENT TAXES.

6. An order by a county court that the sheriff proceed to levy on and sell all property delinquent for taxes for a certain year is not a compliance with Hill's Ann. Laws, § 2818, providing that all unpaid or delinquent taxes may be collected from the land taxed, or the persons, firms or corporations against whom levied, on the order of the county court directing that a warrant be issued; since such order does not direct the issuance of a warrant for the purpose of collecting such tax from the land taxed: *Hughes v. Linn County*, 111.

VOID DELINQUENT TAX WARRANT.

7. A warrant directing the collection of delinquent taxes, issued without the filing of the affidavit required by Section 2811, Hill's Ann. Laws, is void so far as it commands the levy on and sale of real estate: *Hughes v. Linn County*, 111.

TAXING COSTS.

Time Allowed to File Cost Bill in Supreme Court. See COSTS, 4.

TENANCY IN COMMON.**OUSTER AGAINST COTENANT.**

In the absence of knowledge by a tenant in common that a cotenant claims the property adversely to him, there is not an adverse possession without an actual ouster or some equivalent act showing an intent to exclude: *Mattis v. Hosmer*, 523.

TERMS

For Permitting Amendment to Pleadings. See APPEAL, 10.

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TIMBER CULTURE CLAIM.

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TRANSCRIPT.

Presumption of Completeness and Verity on Appeal. See APPEAL, 6.

Who Must Pay for Transcript—Taxing Costs. See COSTS, 2.

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TRESPASS.**INJUNCTION AGAINST LASTING TRESPASS.**

1. Where a trespasser is destroying the substance of the estate, so that its accustomed use is impaired, equity will interfere to prevent a continuance of the injury: *Mudrick v. Brown*, 185; *Parker v. Furlong*, 248.

SINGLE TRESPASS—INJUNCTION.

2. Equity will not interfere after a single act of trespass that did not injure the substance of the estate: *Parker v. Furlong*, 248.

ENJOINING TRESPASS—INSOLVENCY OF DEFENDANTS.

3. In an action to enjoin trespass, proof that defendants are insolvent is not of itself sufficient to justify granting an injunction: *Parker v. Furlong*, 248.

TRIAL.**IMPROPER REMARKS OF COUNSEL—RULING THEREON.**

1. To secure a consideration of the alleged misconduct of counsel before the jury there must have been some erroneous ruling of the trial judge in relation thereto; thus, where an attorney was interrupted by his opponent because it was claimed he was making statements not supported by the testimony, and such statements were not set out in the record, and the judge instructed the jury to disregard matters not in evidence, error assigned on such comments will not be considered on appeal, since it was not based on any erroneous judicial action of the trial court: *Boyd v. Portland Electric Company*, 567.

ALLEGATIONS AND PROOFS MUST CORRESPOND.

2. Under an allegation that plaintiff went out onto the steps of a railroad car which had stopped, intending to alight, but was thrown off by the sudden starting of the train, it is not objectionable to charge the jury that plaintiff could recover if the train was moving so slowly as to justify plaintiff in thinking it had stopped: *Smitsen v. Southern Pacific Company*, 74.

3. Recoveries in legal proceedings must be had, if at all, on the grounds stated in the pleadings; a party will not be permitted to recover on a claim or theory that has not been pleaded. Thus, where neither the complaint nor the answer alleged an intention of the parties that a deed and bill of sale sought to be set aside and canceled should be considered as mortgages, but the complaint was predicated on the theory of mental incapacity to execute and failure to deliver the deed, a recovery cannot be claimed on the mortgage theory: *Swank v. Swank*, 439.

OBJECTION OF WANT OF LEAVE TO SUE ON BOND OF PUBLIC OFFICIAL.

4. The objection that leave to sue on the bond of a public officer was not obtained before beginning the action must be made by a motion for nonsuit, as provided for by Hill's Ann. Laws, § 342: *Multnomah County v. Kelly*, 1.

SUFFICIENCY OF EVIDENCE—QUESTION FOR JURY—NONSUIT.

5. Where there is any competent evidence in support of a material allegation in a complaint, the case should be submitted to the jury, as they are the sole judges of the sufficiency of competent evidence: *Currey v. Butcher*, 380.

QUESTIONS FOR JURY—FALLEN ELECTRIC WIRE—REASONABLE CARE.

6. In an action for injuries occasioned by a live electric wire which had been blown down in a storm, an instruction that the defendant company could not excuse a delay in replacing such wire on the ground that they did not have a sufficient force to replace it sooner was erroneous, since the question whether the company exercised reasonable care was for the jury: *Boyd v. Portland Electric Company*, 567.

CONTRADICTION OF EVIDENCE BY PHYSICAL FACTS.

7. The testimony for both parties is reviewed and it is decided that the plaintiff's testimony was not sufficiently contradicted by physical facts to warrant the direction of a verdict for the defendant. If the established physical facts should conclusively show that the testimony of a witness could not be true, then it would probably be the duty of the court to reject such testimony, but such is not the case here: *Smitson v. Southern Pacific Company*, 74.

CROSS-EXAMINATION—FOUNDATION FOR IMPEACHMENT.

8. Where a witness, on cross-examination, made contradictory statements as to the position of the plaintiff when she fell from a train and was injured, questions as to statements made by him out of court, concerning how the accident occurred, inconsistent with his testimony in chief, were properly allowed to lay a foundation for impeachment: *Smitson v. Southern Pacific Company*, 74.

CROSS-EXAMINATION—LIMITS.

9. In an action for negligence in dumping ashes from an engine, and falling to extinguish fire in such ashes, where defendants' engineer has testified to the exercise of an exceptional care on the part of defendants' servants in extinguishing such fire because of a previous fire that day from the same engine, it is proper to permit a cross-examination as to the location of the previous fire: *Lieuallen v. Mosgrove*, 446.

DESIRED INSTRUCTIONS SHOULD BE REQUESTED.

10. If a particular instruction is desired on a given point it should be requested; counsel cannot sit by while the jury is being charged and then complain on appeal that something was omitted: *Smitson v. Southern Pacific Company*, 74.

ENTIRE CHARGE MUST BE CONSIDERED.

11. All the instructions in a charge must be considered together, and if a given point is, on the whole, fairly presented, the case should not be reversed for inaccuracies in some paragraphs: *Smitson v. Southern Pacific Company*, 74.

INSTRUCTION NOT USURPING PROVINCE OF JURY.

12. Under Hill's Ann. Laws, § 220, prohibiting the trial court from presenting the facts of a case to the jury, it was not error to instruct the jury that there was evidence for the plaintiff "to the effect" that the train came to a standstill, and that there was evidence "tending to show" that the accident occurred about 9 o'clock, as the court evidently did not attempt to state the facts to the jury, but merely called their attention to the theories of the respective parties: *Smitson v. Southern Pacific Company*, 74.

INCONSISTENT INSTRUCTIONS—REVERSIBLE ERROR.

13. Where the instructions given by the court of its own motion are correct expositions of the law applicable to the case, the fact that those given at the request of the defendant restrict those given by the court in some particulars, does not constitute reversible error, on the ground that the instructions are inharmonious, and it cannot be told which the jury followed in arriving at their verdict, where their finding for the plaintiff showed that they had followed those given by the court of its own motion, and also that they were not misled by the defendant's instructions: *Smitson v. Southern Pacific Company*, 74.

REFUSING INSTRUCTIONS ALREADY GIVEN.

14. A refusal to give an instruction already substantially covered by the court's general charge is not error: *Lieuallen v. Mosgrove*, 446.

ORDER OF PROOF.

15. Under Hill's Ann. Laws, § 890, declaring that the order of proof shall be in the discretion of the court, in a suit for the specific performance of a parol contract to convey land, executed on complainant's part, the admission of evidence of the agreement before proof of complainant's performance was not error: *Barrett v. Schleich*, 618.

MEMORANDUM AS EVIDENCE.

16. To render admissible in evidence a memorandum used by a witness while on the stand, it must appear that the witness' memory is uncertain without it, and that he knew it was true at the time it was made: *Susewind v. Lever*, 365.

TRUSTS AND TRUSTEES.**UNSETTLED TRUST—ACTION FOR DAMAGES.**

1. While a trust is unsettled, and until there has been an accounting by the trustees, a law action cannot be maintained either for damages or for money had and received: *Nodine v. Wright*, 411.

2. Where a debtor conveyed his property to a trustee to convert into money and pay his debts, and the trustee fraudulently conveyed the property to his friends and business associates for much less than it was worth, such debtor could not maintain an action at law against the trustee and his grantees for damages, without first bringing a suit in equity for an accounting and closing of the trust: *Nodine v. Wright*, 411.

UMATILLA INDIANS.

Law of Descent of Land in Umatilla Reservation. See **INDIANS**, 3.

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Adverse Claim to Mine as Against Government. See **LIM. OF ACTION**, 3.

UNITED STATES STATUTES. Same as **STATUTES OF UNITED STATES**.

USURY.**INCREASED INTEREST AFTER DEFAULT NOT USURY.**

1. A note payable at a stated time with a given rate of interest, and providing that in default of payment of either principal or interest the principal should bear a higher rate of interest from the date of the note, will not be considered usurious unless it appears that the parties intended to avoid the law, but such additional interest will be considered as a penalty for nonpayment: *Law Trust Society v. Hogue*, 544.

2. Where a note was payable five years after execution, with interest at eight per cent., and, in default in payment of either principal or interest, then two and one half per cent. additional interest should be charged on the principal, such additional interest was a penalty, avoidable by prompt payment, and did not constitute usury, under Hill's Ann. Laws, §§ 3587, 3588, providing that a contract for greater than ten per cent. interest, either directly or indirectly, is usurious and forfeits the debt: *Law Trust Society v. Hogue*, 544.

VENUE.**TERRITORIAL JURISDICTION OF JUSTICE'S COURTS.**

A justice of the peace has territorial jurisdiction only within the county where he sits, and only over a defendant who is there found—his process does not run beyond the county line: *Pierce v. Rock Creek Mining Co.*, 848.

VERDICT.

Sufficiency of Verdict to Support Judgment. See **JUDGMENTS**, 13.

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WAIVER.

WAIVER OF DEFECT IN COMPLAINT BY ANSWERING.

1. An objection that a complaint claiming damages for neglect does not allege a specific negligent act done or a duty negligently omitted is waived by answering, and is cured by a verdict for plaintiff: *Chan Sing v. Portland*, 68.

2. The objection that a complaint defectively stated a cause of action is waived by answering, particularly where the issue of fact involved was made by answer and reply, and was tried without objection: *Roseburg Railway Co. v. Noster*, 299.

WAIVING RIGHT TO APPEAL BY ACCEPTING PAYMENT.

3. While a party cannot appeal from a judgment in his favor after receiving the benefits thereof, his right of appeal is not waived where the amount accepted would accrue to him in any event, notwithstanding the appeal, which was for the enforcement of a disputed right to money in addition to the amount accepted: *Merriam v. Victory Mining Co.* 321.

WAIVING DEFECT OF JURISDICTION.

4. A defect in jurisdiction over the parties is waived when they appear and proceed without urging the defect: *State v. Blizz*, 401.

WAREHOUSEMEN.

NEGOTIABILITY OF WAREHOUSE RECEIPTS—PAROL EVIDENCE.

A statute declaring that warehouse receipts shall be "negotiable, and may be transferred by indorsement of the party to whose order such receipt was given or issued, and such indorsement shall be deemed a valid transfer of the commodity represented by such receipt," makes such receipts negotiable, in the sense that a transfer thereof by indorsement carries the absolute title to the commodities represented by the receipts and protects bona fide purchasers for value from unknown equities between the original parties; but does not render them negotiable, so as to render parol evidence inadmissible, in an action on such receipts, to show that the firm issuing the same was in fact acting as agent. In that respect such receipts are simple contracts: *Anderson v. Portland Flour. M. Co.* 463.

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Of Title—Breach—Attorney's Fees as Damages. See SALES, 2.

WATERS AND WATER RIGHTS. See, also, NAVIGABLE WATERS.

APPROPRIATION OF SURPLUS.

1. The right to use water from a nonnavigable public stream depends upon the date of the appropriation; thus, A, being a prior appropriator, has a right to take enough water for his necessary purposes, after which the next appropriator may use enough of the surplus for his necessary use, and so on, but the first appropriator cannot buy the land of, for example, the third appropriator and use the water for this land as against the second appropriator: *Boyce v. Cupper*, 256.

2. Where defendant's grantor obtained title to a certain tract of land, and used the water of a stream to irrigate it, and afterwards plaintiff, a lower riparian owner, appropriated the surplus water for the irrigation of his land, and afterwards defendant's second grantor conveyed to him an intermediate tract, which at the time defendant did not intend to irrigate, he can not afterwards appropriate to the irrigation of the intermediate tract the surplus water theretofore used by plaintiff: *Boyce v. Cupper*, 256.

INAUGURATION OF ADVERSE USE OF WATER.

3. Where it appears that defendant's use of the water of a stream for irrigation purposes was not so extensive as to render the water supply of plaintiff, a lower riparian owner, insufficient, such use by defendant is not so adverse to plaintiff's right as to form a basis for a claim of title by adverse user: *Boyce v. Cupper*, 256.

PERCOLATING WATER—RIGHT OF RECAPTURE.

4. Percolating water, the course of which is unknown and unascertainable, belongs to the reality on which it is found, but, after having passed into a channel, ownership of it ceases and it cannot be recaptured: *Boyce v. Cupper*, 256.

5. Where, in a suit to enjoin defendant, an upper riparian owner, from appropriating the water of a stream to the irrigation of his land, in derogation of plaintiff's prior appropriation thereof, it appears that the water of the stream

comes from swamps and marshes on a tract owned by defendant still higher up the stream, from which it proceeds by percolation, and without any well-defined channel, to the stream, such fact does not give the defendant the right to recapture the water for the irrigation of his lower tract, since his title to the swamp water ceases when the water reaches the stream: *Boyc v. Copper*, 256.

WATER RIGHT AS AN APPURTENANCE.

6. The use of water from a stream for a beneficial use in connection with a tract of land makes the right appurtenant to such land, and it passes under a deed thereto: *Mattis v. Hosmer*, 523.

INCOMPATIBLE USES OF WATER.

7. One party's right to use water for irrigation purposes is not necessarily incompatible with another's right to use the same water in operating a mine, since the diverse uses are generally made at different seasons of the year: *Mattis v. Hosmer*, 523.

WATERS—ESTOPPEL TO REVOKE PAROL LICENSE.

8. The fact that a riparian owner upon a navigable stream made no objection when a lower riparian owner announced his intention to build a dam on her land, is not equivalent to a license to construct the dam; nor is such passive acquiescence such an encouragement to expend money in building the dam as will preclude the landowner from enjoining its maintenance when constructed: *Hallock v. Suitor*, 9.

9. The fact that defendant's grantors silently acquiesced in the construction by plaintiff, at considerable expense, of an irrigating ditch across their lands, did not estop defendant, prior to the expiration of the period of limitation, from cutting off the supply of water, plaintiff's right being a bare license, revocable at will: *Ewing v. Rhea*, 583.

MINING CLAIM—NUISANCE BY BACKING WATER.

10. A dam across a nonnavigable stream, whereby debris from the mines of an upper proprietor is arrested, does not constitute a private nuisance, entitling the upper proprietor to abate it, unless the dam backs the water on the upper proprietor's premises, causing him such injury that he can maintain an action therefor: *Turner v. Locy*, 158.

11. If it be conceded that an upper riparian proprietor on a nonnavigable stream has a right to use the waters thereof to carry off tailings from his placer mines (about which the authorities are divided), still a court of equity will hesitate to enjoin a lower appropriator from damming the stream unless it is clear that the upper proprietor will be injured. This is not sufficiently evident in this case to justify equitable interference: *Blair v. Boswell*, 168.

FORMALITIES IN TRANSFERRING MINING DITCHES.

12. While Sections 3833 and 3834 of Hill's Ann. Laws were in force (they were enacted 29 October, 1870, and repealed 14 October, 1888,) a ditch used to supply water for mining could be transferred only by deed, although during the same period placer mines were personalty, and irrigating ditches and the right to use water for agriculture passed by delivery of possession: *Mattis v. Hosmer*, at pp. 531, 534.

FORMALITIES IN TRANSFERRING IRRIGATING DITCHES.

13. In selling an irrigating ditch, or water right used for irrigation, no formalities are or have been necessary in this state, but any actual transfer of possession suffices, though the rule has been different with mining ditches: *Mattis v. Hosmer*, at p. 534.

WINDS.

Evidence of Probability of Wind Under Stated Conditions. See EVIDENCE, 7.

WITHDRAWING APPEAL BOND.

Bond Cannot be Withdrawn Pending Appeal. See APPEAL, 23.

WITNESSES.

DAMAGES AGAINST WITNESS FOR NONATTENDANCE.

1. Under Hill's Ann. Laws, § 708, providing that a witness disobeying a subpoena duly served shall forfeit to the party requiring his attendance the sum of \$50 and all damages sustained, which forfeiture and damages may be recovered in an action at law, the payment to a witness of his fees and mileage is not sufficient to entitle the party requiring his attendance to recover the penalty for nonattendance, but it must be shown that the witness was material, and that damage other than the loss of such fees and mileage resulted from his nonattendance: *Lombard v. Smith*, 23.

CONTINUANCE BECAUSE OF ABSENT WITNESS.

2. The matter of granting continuances to secure the attendance of absent witnesses is within the discretion of the trial court, and is largely regulated by Section 179, Hill's Ann. Laws, providing that the trial shall proceed if the other party will admit that the absent witness would, if present, testify as claimed: *Lew v. Lucas*, 208.

CROSS-EXAMINATION—FOUNDATION FOR IMPEACHMENT.

3. It is always competent to lay a foundation for impeaching a witness by inquiring of him concerning other statements inconsistent with his testimony: *Smilson v. Southern Pacific Company*, 74.

CROSS-EXAMINATION—BRINGING OUT DETAILS.

4. After a witness has testified to an occurrence, the adverse party should be permitted to inquire regarding the location and circumstances: *Licualten v. Mosgrove*, 448.

CONTRADICTION OF WITNESS BY PHYSICAL FACTS.

5. If the contradicted physical conditions shown to have existed at the time a witness referred to were such as to render it impossible for the statements of the witness to be true, it would probably be the duty of the trial judge to instruct the jury to disregard the testimony of the witness: *Smilson v. Southern Pacific Company*, 74.

WORDS AND PHRASES.

"DUE."

The meaning of this word is discussed and considered at some length in *Jones v. Adams*, at p. 478.

"RAILROAD PURPOSES."

What use a property is for a legitimate railroad purpose is considered in *Abraham v. Oregon & California Railroad Company*, 495.

"STRUCTURE"—MINE—LIEN LAW.

A mine or mining claim is not a "structure" within the meaning of Section 3608, Hill's Ann. Laws, which confers the right to a lien for material or labor used in any structure, so that a mill and a tramway thereto from a mine are structures by themselves, and a lien may be enforced against them without reference to the mine: *Watson v. Noonday Mining Company*, 287.

"TIME ALLOWED FOR FILING TRANSCRIPT."

The expression "time allowed to file the transcript," used in Hill's Ann. Laws, § 541, subd. 2, as amended (Laws, 1899, p. 227, § 2, subd. 2), providing the time within which a transcript must be filed in the supreme court, means the original thirty days allowed by the statute and any extension thereof that may have been granted; but each extension must be secured before the previous one has expired: *Tallmadge v. Hooper*, 508.

"WILLFUL" IN DIVORCE STATUTE—DESERTION.

The word willful, as used in Hill's Ann. Laws, § 495, subd. 5, authorizing a divorce for "willful desertion," means an intentional forsaking, wrongfully and without cause, whereby the marital union is destroyed: *Ogilvie v. Ogilvie*, 171.

WRIT OF REVIEW.

OPENING HIGHWAY—APPEAL.

An appeal from the award of damages in a proceeding for opening a public road does not preclude the right to review the regularity of the proceedings establishing such road: *Fanning v. Gilliland*, 369.

WRONGFUL INJUNCTION.

Damages—Pleading Malice and Want of Probable Cause. See MAL. PROS.

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